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THE 2003 LEGISLATIVE ASSAULT ON VIOLENT VIDEO GAMES: JUDICIAL REALITIES AND REGULATORY RHETORIC

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INTRODUCTION

The year 2003 was not kind to the foes of video games that depict violent images.¹ First, in January, the United States Supreme Court upheld a federal appellate court decision dismissing a lawsuit against several video game manufacturers for allegedly causing Michael Carneal to murder three girls at Heath High School near Paducah, Kentucky, in 1997.² Then, in June 2003, a federal appellate court enjoined a St. Louis County, Missouri, ordinance that made unlawful the selling or renting of graphically violent video games to minors without parental consent, because it could not sur-

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1. See Mike Snider, *Eye of the Beholder? Conflicting Video Game Research Reflects an Escalating Debate*, USA TODAY, Aug. 5, 2003, at 6D [hereinafter *Beholder*]. In fact, the year was so bad for those who would regulate the video game industry that even the mainstream media have noted that the "[o]pponents of regulations are on a roll." *Id.*

2. See *James v. Meow Media, Inc.*, 300 F.3d 683, 684 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) (holding video games do not constitute "products" for purposes of imposing strict liability).

vive constitutional scrutiny.³ Finally, in July 2003, Judge Robert S. Lasnik issued a preliminary injunction preventing Washington from enforcing a first-of-its-kind statute prohibiting the sale or rental to minors of video and computer games that depict realistic images of violence on simulated law enforcement officers.⁴

The first in the above-mentioned trio of decisions mirrors a pair of federal district court opinions from 2002 dismissing other civil lawsuits filed against video game manufacturers.⁵ The latter two decisions, involving St. Louis County and Washington, come relatively quickly on the heels of a unanimous 2001 opinion by the United States Court of Appeals for the Seventh Circuit striking down an Indianapolis, Indiana ordinance restricting minors' access to violent video games.⁶ It seems that the judicial tide is now firmly against both civil lawsuits and legislation targeting video game manufacturers for selling products that supposedly cause or contribute to real-life violence.

Yet such opinions, and the overwhelming weight of judicial authority in favor of the First Amendment right of free expression,⁷

3. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003), *petition for reh'g en banc denied*, 2003 U.S. App. LEXIS 13782 (2003) (holding county ordinance violated First Amendment right to free speech when applying strict scrutiny analysis).

4. See *Order Granting Plaintiff's Motion for Preliminary Injunction* at 8, *Video Software Dealers Ass'n v. Maleng*, (W.D. Wash. 2003) (No. C03-1245L) ("Plaintiffs have raised serious questions regarding defendants' ability to show that the Act, even if crafted to further a compelling state interest, is narrowly tailored to alleviate the perceived harm."). The Washington law was back before Judge Lasnik again in June 2004 when he heard oral argument on summary judgment motions filed by both parties in the case. See John Cook, *Court Duel on Video Violence*, SEATTLE POST-INTELLIGENCER, June 25, 2004, at C1.

5. See *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002) (dismissing negligence and products liability claims against manufacturer of video game *Doom* filed by widow and stepchildren of teacher killed at Columbine High School in April 1999); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002) (dismissing product liability, unfair trade practices, and emotional distress claims filed by mother of boy stabbed to death by another youth allegedly obsessed with video game *Mortal Kombat*); see also Clay Calvert, 2002 Symposium Update: *Media Liability for Violent Conduct: One Year Later*, 23 LOY. L.A. ENT. L. REV. 247, 249-50 (2003) (analyzing four pro-media opinions from 2002 involving harm allegedly caused by media products).

6. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579-80 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (determining city failed to show compelling interest in restricting access to video games depicting violent acts). See generally Clay Calvert, *Violence, Video Games and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1 (2002) (lauding Seventh Circuit court of appeals' opinion in *Kendrick*) [hereinafter *Violence*].

7. See U.S. CONST. amend. I. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.* The free speech and free press clauses have been incorporated, through the Fourteenth Amendment Due Process Clause,

have done little if anything to hinder efforts by proponents to impose legislative restrictions on minors' access to violent video games. For instance, in February 2003, Representative Joe Baca introduced the "Protect Children from Video Game Sex and Violence Act of 2003"⁸ to Congress which, as Baca trumpeted in an official press release, "would make it a federal crime for retailers to sell ultra violent and sexually explicit video games to minors because the games can be harmful to children."⁹ Representative Baca, a Democrat from Rialto, California, contends "kids are being brain-washed" by video games.¹⁰ As this article makes clear in Part III, this type of bombastic hyperbole is just one example of the rhetoric employed by the growing legion of legislators¹¹ and other anti-video game advocates who seek to curb minors' access to the increasingly popular products.¹²

to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

8. H.R. 669, 108th Cong. (2003) (proposing prohibition on sale or rental of violent and sexually explicit video games to minors).

9. Press Release, Cop Killing, Prostitution, Mass Murder, Sodomy — Is it All Just a Game? (Feb. 13, 2003) (announcing reintroduction of bill, which died in committee under previous Congress), at <http://www.house.gov/baca/108th/pr030213a.htm>.

10. See Press Release, Baca to Federal Trade Commission: "What are you doing to protect our kids?" (Apr. 10, 2003) (reporting on hearings before House Commerce, Justice, State, and Judiciary Appropriations Committee), at <http://www.house.gov/baca/108th/pr030410.htm>.

11. See Undated Letter from Howard L. Berman and John Conyers, Jr., Committee on the Judiciary, to Colleague, entitled "Concerned About Video Game Violence? Legislation Trammeling the First Amendment Isn't the Answer: Promote Parental Awareness and Retailer Enforcement of Game Ratings" (on file with authors). It is important to note that not all members of Congress support the Baca-proposed legislation. For instance, Representative John Conyers, Jr., of Michigan, the ranking minority member of the House of Representatives Committee on the Judiciary, along with Representative Howard L. Berman from California, drafted a letter to their colleagues in Congress stating in pertinent part that "[t]he consistent case law makes it clear that H.R. 669 is an unconstitutional violation of the First Amendment" and suggesting to House members that "your time would be better spent promoting parental awareness and retailer enforcement of video game ratings, rather than working for enactment of unconstitutional legislation." *Id.*

12. See *Top Ten Industry Facts*, Entertainment Software Association Media Center, at <http://www.theesa.com/pressroom.html> (last visited Mar. 29, 2004). According to the Entertainment Software Association, the organization formerly known as the Interactive Digital Software Association and a named party in several of the cases described in this article, sales of computer and video game software in 2003 grew 8% from 2002, generating \$7 billion in sales. See *id.* "In 2003, more

Representative Baca and the more than forty co-sponsors of the federal legislation who had joined him by June 2003 are not alone in their quest to enact access-limitation legislation. At the state level, legislation was introduced across the country in 2003. For instance, a bill was introduced in South Carolina in May 2003 by Ralph Davenport, a Republican from Boiling Springs in Spartanburg County.¹³ The bill provides, in relevant part, that “[a] person who sells, rents, or permits to be sold or rented a violent video or violent computer game is guilty of a misdemeanor and, upon conviction must be imprisoned not more than one year, or fined not more than one thousand dollars.”¹⁴

Likewise, in Pennsylvania, Democratic State Senator Jack Wagner introduced a bill in June 2003 that states “[a] person commits a summary offense if the person sells, rents or otherwise provides for use for a charge any violent video or computer game to a minor. A person commits a misdemeanor of the third degree for a second or subsequent violation of this subsection.”¹⁵ Wagner introduced similar legislation earlier in 2003 that provided:

A person commits a summary offense if the person sells, rents or otherwise provides for use for a charge any video game to a minor[,] which contains scenes or depictions of graphic violence as determined by the Entertainment Software Rating Board. A person commits a misdemeanor of the third degree for a second or subsequent violation of this subsection.¹⁶

In addition to South Carolina and Pennsylvania, legislative initiatives that would restrict minors’ access to violent or graphic video games were introduced and were pending in 2003 in Delaware,¹⁷

than 239 million computer and video games were sold, or almost two games for every household in America.” *Id.*

13. See H.R. 4148, 115th Gen. Assem., Reg. Sess. (S.C. 2003-04) (criminalizing sale or rental of violent video games), available at <http://www.scstatehouse.net/>.

14. *Id.* § 1.

15. S. 822, 2003 Gen. Assem., Reg. Sess. § 1 (Pa. 2003) (criminalizing sale or furnishing of violent video games to minors).

16. S. 349, 2003 Gen. Assem., Reg. Sess. § 6321(a) (Pa. 2003) (outlining of offenses for selling interactive violent video games to minors).

17. See H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003). This bill makes it a misdemeanor offense:

for a person to sell at retail or rent or attempt to sell at retail or rent, to (1) a person under the age of 17 any video game with an official rating of “M” for mature audiences or (2) a person under the age of 18 any video game with an official rating of “AO” for adult only audiences. A person attempting to purchase or rent a video game rated for mature or adults

Michigan,¹⁸ Minnesota,¹⁹ New Jersey,²⁰ and New York.²¹ In addition to these measures, each of which was alive and pending at the

only audiences shall be required to show an identification card that provides a date of birth.

Id. § 1.

18. See H.R. 4267, 92d Leg., Reg. Sess. (Mich. 2003). This bill, introduced in February 2003, makes it a misdemeanor offense "punishable by imprisonment for not more than 90 days or a fine of not more than \$1,000.00, or both" for a person to "sell or rent a restricted video game to a person who is less than 17 years of age. As used in this section, 'restricted video game' means a video game rated AO or M by the entertainment software rating board." *Id.* § 143(a).

19. See S. 35, 83d Leg., Reg. Sess. (Minn. 2003). This bill, which was introduced in January 2003, would make it a misdemeanor for a person to "sell or rent a restricted video game to a person under 17 years of age" and defines the term "restricted video game" to mean "a video game rated AO or M by the entertainment software rating board." *Id.* § 1. In addition, another bill introduced in the Minnesota Senate in May 2003 — this one targeting minors who purchaser video games rather than the retail sellers and distributors — provides in pertinent part that "[a] person under the age of 17 who knowingly rents or purchases a restricted video game is guilty of a petty misdemeanor and is subject to a fine of not more than \$25." S. 1140, 83d Leg., Reg. Sess. § 1 (Minn. 2003).

20. See S. 2194, 210th Leg., Reg. Sess. (N.J. 2003). This bill was introduced in January 2003 by State Senators Joseph A. Palaia and John O. Bennett and closely tracks the legislation proposed in Delaware. It provides in relevant part:

It shall be unlawful for a person to sell at retail or rent, or attempt to sell at retail or rent, to (1) a person under age 17 any video game clearly designated as rated for mature, or restricted audiences or (2) a person under age 18 any such game for adults only audiences. A person attempting to purchase or rent a video game rated for mature or adults only audiences shall be required to show an identification card that provides a date of birth.

Id. § 2(a); see also *supra* note 17 (setting forth similar legislation proposed in Delaware).

21. See A. 3999, 2003 Reg. Sess. (N.Y. 2003). This bill, which was introduced in February 2003, provides in relevant part that:

Every owner, proprietor or manager of a commercial establishment that offers or displays one or more video games or interactive media devices for use by the public shall prohibit a person under sixteen years of age from playing or using any video game or interactive media device which as part of the use of such game, requires the player to use a model or toy replica of a gun, pistol, rifle or similar weapon which simulates firing ammunition.

Id. § 4.

In addition, another Assembly bill proposed in February 2003 provides that "[n]o owner or operator of any premises where video games, including a violent point and shoot video simulator, are provided for entertainment shall permit a person under the age of eighteen to operate such violent point and shoot video simulator." A. 3571, 2003 Reg. Sess. § 1 (N.Y. 2003).

A third bill proposed in New York in 2003 provides in relevant part:

No person, partnership or corporation shall sell or rent or offer to sell or rent to any person under the age of eighteen years any video game that contains depictions descriptive of, advocating or glamorizing commission of a violent crime, suicide, sodomy, rape, incest, bestiality, sado-masochism, any form of sexual activity in a violent context, or advocating or encouraging murder, violent racism, religious violence, morbid violence or the illegal use of drugs or alcohol.

time this article was written, legislation was also proposed in other states during 2003 but has since died.²² In brief, a veritable plethora of legislative measures targeting graphic, violent, or sexual video games surfaced in 2003.

In the state of Washington, Assistant Attorney General Jeff Even has vowed to appeal the decision of U.S. District Court Judge Robert Lasnik's order enjoining that state's legislation.²³ As he told a reporter after the judge's order, "[o]bviously we've got to take a shot at defending the law. The people are entitled to their day in court."²⁴ The people certainly will end up paying for their day in court too; it will cost Washington taxpayers an estimated \$90,000 to defend the legislation against overwhelming odds.²⁵ Whether such money is well spent apparently is not an issue for the law's primary sponsor, Mary Lou Dickerson, who, after Judge Lasnik's decision, stated that she "strongly believe[s] the courts will decide that the sickening levels of violence, brutality and racism being peddled to children for profit cannot be wrapped in our precious First Amendment."²⁶

We now are in the middle of a new chapter of an age-old story that pits the protection of children from speech and its supposedly deleterious effects,²⁷ against the First Amendment rights of chil-

S. 2327, 2003 Reg. Sess. § 1 (N.Y. 2003). This language mirrors that found in a fourth bill introduced in New York in 2003. See A. 3780, 2003 Reg. Sess. § 2 (N.Y. 2003).

22. See, e.g., H.R. 2739, 84th Gen. Assem., Reg. Sess. (Ark. 2003) (seeking to prohibit any person or entity from "knowingly sell[ing] or rent[ing] a video game that is harmful to minors unless the minor is accompanied by a parent or legal guardian who consents to the purchase or rental"); S. 2024, 2003 Reg. Sess. (Fla. 2003) (creating third-degree felony for anyone "who knowingly sells or rents an adult video game to person younger than [eighteen] years of age" and which defined term "adult video game" to mean "any video recording of a game which contains representations or images of excessive violence, nudity or sexual conduct that is harmful to persons younger than 18 years of age, or criminal activity"); S. 586, 2003 Leg., Reg. Sess. (La. 2003) (providing it is unlawful to "sell or rent or offer to sell or rent to any person under the age of eighteen any video game or computer game which has been given a rate of 'Mature' or 'For Adults Only' or an equivalent rating by the video or computer game manufacturer or any entertainment rating board that is commonly used in the industry").

23. Dan Richman, *Judge Blocks Law Curbing Some Violent Video Games*, SEATTLE POST-INTELLIGENCER, July 11, 2003, at A1; see also *supra* note 4 and accompanying text (describing judge's order).

24. Richman, *supra* note 23, at A1.

25. See *id.* (indicating intention to further pursue constitutionality of Washington Law restricting violent video games).

26. Paul Queary, *Federal Judge Blocks Violent Video Games Law*, ASSOC. PRESS STATE & LOCAL WIRE, July 11, 2003, available at LEXIS-NEXIS Academic Universe.

27. See GEORGE RODMAN, MAKING SENSE OF MEDIA: AN INTRODUCTION TO MASS COMMUNICATION 368-69 (2001) (writing "concerns about the impact of media are

dren to receive that speech, and rights of manufacturers to produce and distribute speech to children.²⁸ It is a common situation in which, as First Amendment scholar and Dean of the University of Richmond's T.C. Williams School of Law Rodney Smolla put it, the government attempts to "regulate the speech children are exposed to and thus restrict what *adults say to children*."²⁹ In this case, the adults restricted are in the video game industry.³⁰ What is radically different now, however, is the technology. Video and computer games with incredibly realistic and vibrant images provide the landscape for the legislative battle currently being waged across the United States.

This article examines the intensifying conflict between those who would regulate the video games to which children are exposed and those in the video game industry, as well as free speech advocates, who would protect minors' access to such speech products. In particular, this article takes a comprehensive, three-pronged approach to the conflict and looks at judicial realities, legislative initiatives, and rhetorical strategies.

First, Part I examines legal precedent and judicial analysis by reviewing two of the opinions handed down by federal courts in 2003 — *Interactive Digital Software Association v. St. Louis County*³¹ and *Video Software Dealers Association v. Maleng*³² — in which access-restriction laws were enjoined.³³ Part II then turns to bills and legislation now pending at the federal and state levels and analyzes several specific examples to determine whether some of these new measures, if enacted, would be held unconstitutional in light of the opinions and precedent examined in Part I.³⁴ Next, Part III exam-

as old as the media themselves" and describing Payne Fund studies conducted in 1929 by social scientists because "[a]t this time, children went to the movies, on average, once a week, and many experts and lay people were concerned that children seemed to be picking up antisocial habits from their movie viewing").

28. See *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (citing government's legitimate "interest in the well-being of its youth" as justifying New York's statute prohibiting sale to minors of sexually explicit material, which is otherwise non-obscene and accessible for adults). This tension, although addressed in this article in the context of images of violence in video games, is particularly prevalent in efforts to restrict minors' access to sexually explicit expression that is otherwise suitable for adults. See *id.*

29. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 329 (Knopf, Inc. 1992).

30. For a discussion of the First Amendment rights of "video retailers" at stake, see *infra* note 178 and accompanying text.

31. 329 F.3d 954 (8th Cir. 2003).

32. No. C03-1245L (W.D. Wash. 2003).

33. See *infra* notes 37-178 and accompanying text.

34. See *infra* notes 179-300 and accompanying text.

ines the rhetorical devices, arguments, and strategies most often employed by the proponents of access-restriction legislation that allow them to continue to initiate and generate bills that have little chance of being upheld when challenged by the video game industry.³⁵ Finally, the article concludes by arguing that voices of reason must prevail to protect the First Amendment and that state and federal resources are being squandered in misguided and fruitless efforts to protect children and society from speculative harms.³⁶

I. JUDICIAL REALITIES FROM 2003: WHY VIDEO GAME ACCESS-LIMITATION LAWS ARE UNCONSTITUTIONAL

When Judge Richard Posner reminded the City of Indianapolis back in 2001 that “[c]hildren have First Amendment rights” and then went on to strike down that city’s ordinance forbidding unaccompanied minors in arcades with five or more machines from playing video games deemed to be “harmful to minors,”³⁷ he established a precedent that would influence decisions handed down just two years later in *Interactive Digital Software Association* and *Video Software Dealers Association*.

Posner, writing for a unanimous three-judge panel of the Seventh Circuit in *American Amusement Machine Association v. Kendrick*,³⁸ placed video game violence in the historical literary context of *The Divine Comedy* and *The Odyssey* and made it clear that “[v]iolence and obscenity are distinct categories of objectionable depiction,” with the former receiving First Amendment protection and the latter lacking such a safeguard.³⁹ He added that “the world of kids’ popular culture . . . is not lightly to be suppressed” and that, in reference to Indianapolis’s ordinance, “conditioning a minor’s First Amendment rights on parental consent of this nature is a curtailment of those rights.”⁴⁰

Posner also noted that although video games involve an interactive quality that allows users to change the outcome of the story, this does not place them outside of the scope of First Amendment

35. See *infra* notes 301-74 and accompanying text.

36. See *infra* notes 375-81 and accompanying text.

37. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

38. *Id.* at 579-80.

39. *Id.* at 574 (submitting lack of constitutional protection for obscene material does not necessarily extend to violent material).

40. *Id.* at 578 (arguing many children would abstain from playing violent video games if in company of their parents).

protection.⁴¹ Posner wisely observed that “[a]ll literature (here broadly defined to include movies, television and other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”⁴² Along the way, Posner also rejected the social science evidence offered by Indianapolis as not providing the kind of “compelling”⁴³ grounds necessary to support a content-based regulation of speech.⁴⁴ He concluded by slashing “the entirely conjectural nature of the benefits of the ordinance to the people of Indianapolis.”⁴⁵

Although Posner’s precedent from the Seventh Circuit is clearly not binding on judges in other federal circuits, it would embody the same logic and reasoning later embraced in 2003 by the Eighth Circuit considering a very similar ordinance in St. Louis County, Missouri, and by a federal district court in Washington. Those cases, described below, are compared with Posner’s decision in *Kendrick*.

A. *Interactive Digital Software Association v. St. Louis County*

In October 2000, the St. Louis County Council approved, by a 5-0 vote, a bill introduced by then-Councilman Jeff Wagener that would generate years of litigation and cost the local government thousands of dollars to defend.⁴⁶ The bill amended the St. Louis County Revised ordinances to make it unlawful to knowingly sell, rent, or make generally available graphically violent video games to minors, or to permit minors to play these games without the consent of a parent or guardian.⁴⁷ Wagener, the bill’s sponsor, claimed it was necessary because “[e]xposure to such violence has been linked to anti-social and violent behavior, such as the school shootings in Columbine, Jonesboro, and Paducah.”⁴⁸

41. *Id.* at 577 (trumpeting merits of interactivity).

42. *Kendrick*, 244 F.3d at 577.

43. *Id.* at 576.

44. *See generally* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGEORGE L. REV. 69 (1997) (discussing judicial scrutiny of content-based and content-neutral laws).

45. *Kendrick*, 244 F.3d at 580 (noting harm on city of injunction would be slight and outweighed by harm on plaintiff’s if there was no injunction in place).

46. *See* Deborah Peterson, *Restriction on Violent Video Games Has Surprising Supporters*, ST. LOUIS POST-DISPATCH, Oct. 27, 2000, at C4 (noting increase of support for ban on violent video games).

47. *See* Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003) (detailing relevant portions of ordinance).

48. Phil Sutin, *County Official Wants to Restrict Sex Video Games*, ST. LOUIS POST-DISPATCH, Sept. 29, 2000, at C1. Media products were largely blamed for the April 1999 tragedy at Columbine High School near Littleton, Colorado, in which Eric

Even before the bill was passed, it drew the attention and wrath of an organization then called the Interactive Digital Software Association ("IDSA"). The IDSA, now known as the Entertainment Software Association, serves the business and public affairs needs of companies involved with interactive games for video game consoles, handheld devices, personal computers, and the Internet.⁴⁹ At a St. Louis County Council meeting held on October 12, 2000 — two weeks before the bill was passed — general counsel and senior vice president of the IDSA, Gail Markels, told the members of the Council that voluntary steps are better than legal ones and added that the bill would violate constitutional protection of free speech.⁵⁰

Markels was eventually proved correct when the Eighth Circuit declared in June 2003 that the county's ordinance was unconstitutional for failing to survive the strict scrutiny standard of judicial review.⁵¹ Under this standard of review, the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."⁵² Before the Eighth Circuit could apply this test and reach its decidedly pro-First Amendment conclusion, the case was heard by district court Judge Stephen N. Limbaugh.⁵³

Judge Limbaugh's opinion was anything *but* pro-First Amendment. In fact, he ruled that the IDSA failed to meet its initial burden "of showing that video games are a protected form of speech under the First Amendment."⁵⁴ The court reviewed "four different

Harris and Dylan Klebold went on a deadly shooting rampage before killing themselves. See generally Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones*, 2000 L. REV. M.S.U.-D.C.L. 151 (2000) (providing examples of attacks on media products after worst school shooting in United States history).

49. See *Entertainment Software Association*, at <http://www.theesa.com> (last visited June 2, 2004).

50. See Phil Sutin, *Constitution Protects Violent Video Games, Industry Contends*, ST. LOUIS POST-DISPATCH, Oct. 13, 2000, at D4 (noting arguments in favor of constitutional protection of video games).

51. See *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000) (writing "a content-based speech restriction" is constitutional "only if it satisfies strict scrutiny," and defining this test to mean statute "must be narrowly tailored to promote a compelling Government interest"); see also *Interactive Digital Software Ass'n*, 329 F.3d at 960.

52. *Sable Communications of Calif., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115, 126 (1989) (outlining strict scrutiny analysis).

53. *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003) (holding county ordinance was narrowly tailored to serve compelling interest).

54. *Id.* at 1141 (holding First Amendment protection not triggered).

video games[] and found no conveyance of ideas, expression, or anything else that could possibly amount to speech.”⁵⁵ Judge Limbaugh opined that video games, despite the story elements they often contain, were more like bingo and blackjack or baseball and hockey; each of which, he reasoned, is not sufficiently imbued with expression to fall under the protection of the First Amendment.⁵⁶ In a nutshell, video games, from Limbaugh’s perspective, simply were not speech but conduct.⁵⁷

Judge Limbaugh went further in his decision upholding the St. Louis County ordinance and denying the IDSA’s motion for summary judgment. He wrote that even if video games constituted speech for the purpose of the First Amendment, the ordinance would nonetheless survive strict scrutiny.⁵⁸ Applying that standard, Judge Limbaugh held that:

The County has two compelling interests: 1) to protect the physical and emotional health of the children in St. Louis County, and 2) to assist parents to be the guardians of their children’s well-being. In addition, the Court finds that the Ordinance is narrowly drawn to regulate only that expression which is necessary to address the County’s compelling interests.⁵⁹

Finally, Judge Limbaugh rejected the IDSA’s argument that the law was unconstitutionally vague.⁶⁰ Under the void for vagueness doctrine, “[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.”⁶¹ The

55. *Id.* at 1134 (reporting on judge’s review of video games).

56. *Id.* at 1134-35 (noting violence in video game does not impart expression as element of game).

57. *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (“[T]he Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”). Only that conduct deemed to be sufficiently symbolic constitutes speech within the meaning of the First Amendment protection, as Justice Sandra Day O’Connor wrote for a majority of the United States Supreme Court in 2003 when addressing the act of cross burning as a form of speech, “[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black*, 123 S.Ct. 1536, 1547 (2003); *see also* *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (holding for conduct to constitute speech, there must be “[a]n intent to convey a particularized message” and great likelihood in surrounding circumstances “the message would be understood by those who viewed it”).

58. *Interactive Digital Software Ass’n*, 200 F. Supp. 2d at 1141.

59. *Id.*

60. *See id.* (concluding sufficient warning was conveyed).

61. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 763 (Aspen Law & Bus. 1997).

IDSA contended that the terms “minors’ morbid interest in violence,” “graphic violence,” and “patently offensive” used in the ordinance were too vague.⁶² Judge Limbaugh, however, noted that the government had supplied a definition for each of these terms.⁶³ For instance, the ordinance defined “minor” as a person under the age of seventeen, and defined the term “graphic violence” as a “visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.”⁶⁴ Judge Limbaugh concluded that the “language challenged sufficiently conveys a definite warning as to the proscribed conduct” and, therefore, was not unconstitutionally vague.⁶⁵

The Eighth Circuit court of appeals, however, would reverse Judge Limbaugh’s decision, just fourteen months later.⁶⁶ This time, with friend-of-the-court briefs filed on the IDSA’s behalf by prominent free speech organizations such as the American Civil Liberties Union and the Thomas Jefferson Center for the Protection of Free Expression, along with the opinion of Judge Posner in *Kendrick* on the books, the IDSA prevailed.⁶⁷

Writing on behalf of a unanimous three-judge panel, Judge Morris Sheppard Arnold initially concluded that, contrary to Judge Limbaugh’s exceedingly narrow conception of speech, video games are indeed a form of expression within the ambit of First Amendment protection.⁶⁸ Citing *Kendrick* three times in just two pages to support this conclusion, Judge Arnold expanded and built upon Posner’s reasoning that the interactivity element of video games does not render them outside the scope of the First Amendment.⁶⁹ Judge Arnold, including modern pop-cultural references to illustrate his point, wrote:

62. *Interactive Digital Software Ass’n*, 200 F. Supp. 2d at 1139 (setting forth plaintiff’s claim).

63. *See id.* (describing ordinance’s language as “much more precise” than other statutes struck down previously).

64. *Id.*

65. *Id.* at 1140 (emphasizing language’s context in video game industry).

66. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) (reversing lower court).

67. *See id.* at 955 (listing friend-of-the-court briefs filed on both sides). For a further discussion of *Kendrick*, see *supra* notes 37–45 and accompanying text.

68. *See Interactive Digital Software Ass’n*, 329 F.3d at 957–58 (holding video games are afforded First Amendment protection).

69. *Id.* at 957 (using *Kendrick* in court’s analysis).

The County suggests in fact that with video games, the story lines are incidental and players may skip the expressive parts of the game and proceed straight to the player-controlled action. But the same could be said of action-packed movies like "The Matrix" or "Charlie's Angels"; any viewer with a videocassette or DVD player could simply skip to and isolate the action sequences. The fact that modern technology has increased viewer control does not render movies unprotected by the [F]irst [A]mendment, and equivalent player control likewise should not automatically disqualify modern video games⁷⁰

In concluding that video games constitute speech, Judge Arnold also made a key point: First Amendment protection for speech is *not* based or dependent on some abstract, qualitative judicial judgment about how much literary or societal value that speech holds.⁷¹ As he put it, "[w]hether we believe the advent of violent video games adds anything of value to society is irrelevant."⁷² This language mirrors that of other cases involving expression in which judges have not second-guessed First Amendment rights just because the speech itself was violent or offensive.⁷³ In addition, the holding that video games deserve First Amendment protection squares with other courts' acknowledgments that the "First Amendment guarantees of freedom of speech and expression extend to *all artistic and literary expression*, whether in music, concerts, plays, pictures or books."⁷⁴ Recognizing that the medium of expression is not determinative of First Amendment protection, Judge Arnold's opinion simply adds video games to a laundry list of media artifacts

70. *Id.* at 957.

71. *See id.* at 958 (deeming societal value irrelevant).

72. *Id.*

73. For instance, in considering whether the late rap artist, Tupac Shakur, should be held civilly liable to the family of Texas state trooper, Bill Davidson, who was killed by a teenager who listened to Shakur's violent, anti-police messages on the album *2Pacalypse Now*, Judge John D. Rainey wrote:

2Pacalypse Now is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views. Thus, although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons.

Davidson v. Time Warner, Inc., 1997 U.S. Dist. LEXIS 21559, *71-72 (S.D. Tex. 1997).

74. *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 999 (Cal. Ct. App. 1988) (emphasis added) (addressing plaintiff's claim that John "Ozzy" Osbourne's music was proximate cause of son's suicide).

— a list that surely will continue to evolve and expand as technology makes feasible more avenues and venues of storytelling in the future.

Not only did the Eighth Circuit conclude that video games constitute speech within the scope of the First Amendment, it also held that the St. Louis County ordinance could not survive under the strict scrutiny standard of review.⁷⁵ The court initially rejected the government's argument that graphic violence should be treated as obscenity.⁷⁶ Traditionally, obscenity has fallen outside of the scope of First Amendment protection.⁷⁷ Refusing to conflate violence with sex when the two subjects are not inextricably intertwined, Judge Arnold wrote, "[s]imply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."⁷⁸

It is important to note that this decision marked the second time that governmental entities were judicially rebuked for arguing that violence in video games should be treated as if it were concomitant with sexually explicit speech.⁷⁹ In *Kendrick*, the City of Indianapolis asked the Seventh Circuit "to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity, which is normally concerned with sex and is not protected by the First

75. See *Interactive Digital Software Ass'n*, 329 F.3d at 960 (deciding ordinance did not survive strict scrutiny and not deciding whether ordinance is unconstitutionally vague).

76. See *id.* (rejecting government's argument).

77. See *Miller v. California*, 413 U.S. 15, 24 (1973) (noting United States Supreme Court has adopted a three-part test for determining whether speech is obscene). The test asks:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citations omitted); see also DANIEL A. FARBER, *THE FIRST AMENDMENT* 127 (2d ed. 2003) (writing "[o]ne of the traditional exceptions to First Amendment protection was for a category of content called obscenity" and observing "[o]bscenity prosecutions have a long history in the United States").

78. *Interactive Digital Software Ass'n*, 329 F.3d at 958.

79. Cf. Ashley Vanarsdall, *Federal Court Rules Regulations of Video Game Sales Unconstitutional*, Current News Releases, ¶9 (June 3, 2003), at http://www.idsa.com/6_3_2003.html (applauding Eighth Circuit's holding in *Interactive Software Ass'n*). The president of IDSA, Douglas Lowenstein, expressed hopes "that this ruling, coupled with a similar ruling by the [S]eventh Circuit Court of Appeals [in *Kendrick*] will give pause to those who would use the power of the state to regulate speech they find objectionable." *Id.*

Amendment.”⁸⁰ Judge Posner, however, wrote that “[v]iolence and obscenity are distinct categories of objectionable depiction”⁸¹ and that the concerns that justify obscenity laws — protecting people from offensive expression — are different from those that justify laws against violent video games — protecting against “temporal harm by engendering aggressive attitudes and behavior, which might lead to violence.”⁸²

The Seventh and Eight Circuit decisions not to treat violence and obscenity in a similar fashion also dealt a blow to legal scholars who claim the two forms of content should be treated in a comparable manner. In particular, Professor Kevin Saunders recently argued in support of video game legislation in stating that “[p]roperly understood, the obscenity exception would be seen to extend to sufficiently explicit and offensive depictions of violence.”⁸³ Not surprisingly, given this belief and Professor Saunderson’s further contention that there are at least three valid arguments “to justify restricting the access of minors to violent video games,”⁸⁴ he drafted an amicus brief on behalf of an organization called the Lion & Lamb Project⁸⁵ in support of St. Louis County’s ordinance.⁸⁶

80. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001).

81. *Id.* (citation omitted).

82. *Id.* at 575.

83. Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. MICH. ST. U.-DETROIT C.L. 51, 79 (2003) [hereinafter *Three Responses*]. Saunders, who teaches at Michigan State University-Detroit College of Law, contends that “[g]iven the history, both in drama and law, the ordinary language uses of the term, and the inability to distinguish the two under [F]irst [A]mendment theory, the law should allow a refocusing of the obscenity exception to include violence.” *Id.* at 87. An extended version of Saunderson’s thesis can be found in a book he authored. See KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION 3* (Duke Univ. Press 1996) (arguing violent images should be treated like obscenity and contending “[v]iolence is at least as obscene as sex”).

84. Saunders, *Three Responses*, *supra* note 83, at 61.

85. See *The Lion & Lamb Project*, at <http://www.lionlamb.org> (last visited June 2, 2004). The website of this organization states that “[t]he mission of The Lion & Lamb Project is to stop the marketing of violence to children. We do this by helping parents, industry and government officials recognize that violence is not child’s play — and by galvanizing concerned adults to take action.” *Id.*

86. See Brief Amicus Curiae of the Lion & Lamb Project In Support of the Appellee and Supporting Affirmance, *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (No. 02-3010), available at http://www.lionlamb.org/brief_page_1.htm.

In attempting to treat violent content as if it were sexual content,⁸⁷ both St. Louis County and the City of Indianapolis employed the term “harmful to minors” in their respective ordinances.⁸⁸ Why? Because the United States Supreme Court previously had upheld the use of so-called variable obscenity laws that also employed the term “harmful to minors” in the context of restricting minors’ access to sexually explicit speech otherwise accessible to adults.⁸⁹ Both counties apparently hoped that they could borrow the term “harmful to minors” from the area of sexually explicit speech, insert the word “violence” into the definition of “harmful to minors” as it was defined previously to apply only to sexual imagery,⁹⁰ and thereby gain the ability to regulate such violent content without infringing upon the First Amendment.

In particular, St. Louis County, borrowing language from the Supreme Court’s now three-decade-old definition of obscenity,⁹¹ defined the term “harmful to minors” to mean a video game that “predominantly appeals to minors’ morbid interest in violence, . . . is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, lacks serious literary, artistic, political or scientific value as a whole for

87. See Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM. LAW CONSPICUUS 159, 165 (2001). Treating violent and sexual content as if they were each equally reprehensible should not be confused with the position of some who would actually treat violent imagery as far worse than sexual content and who, concomitantly, argue for the protection of sexually explicit speech. See *id.* For instance, Larry Flynt, the flamboyant publisher of sexually explicit magazines including *Hustler* and *Barely Legal*, finds it ironic that

“[y]ou can publish the most gory [sic] photographs on the front page of a mutilated, decapitated body. You might even win the Pulitzer Prize for it. But if you publish a photograph of two people making love, you may go to jail. Now that says a lot about the priorities of a society that condones violence and condemns sex.”

Id.

88. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001) (noting ordinance forbids “use by minors of [] amusement machine that is harmful to minors”); See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 956 (8th Cir. 2003) (stating ordinance in question made it “unlawful to . . . sell, rent, or make minors, or to ‘permit the free play of’ graphically violent video games by minors, without a parent or guardian’s consent”).

89. See *Ginsberg v. New York*, 390 U.S. 629, 663 (1968) (upholding New York statute using term “harmful to minors” to restrict minors access to sexually explicit speech otherwise non-obscene for adults).

90. See, e.g., IND. CODE ANN. § 35-49-2-2 (West 2003) (defining which matters and performances are harmful to Indiana’s minors, and defining such matters in terms of “prurient interest in sex of minors” rather than in relation to violence, which is not mentioned in statute).

91. See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth three-part test for obscenity currently used by United States Supreme Court).

minors, and contains . . . graphic violence.”⁹² Indianapolis had similarly defined “harmful to minors” to mean:

an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and: (1) Contains graphic violence; or, (2) Contains strong sexual content.⁹³

After rejecting St. Louis County’s attempt to equate violence with sex, Judge Arnold then analyzed whether the ordinance served a compelling government interest in accordance with the strict scrutiny standard of review.⁹⁴ The County asserted two interests, which it argued were compelling: (1) “protecting the ‘psychological well-being of minors’ by reducing the harm suffered by children who play violent video games,”⁹⁵; and (2) assisting parents in the task of guarding their children’s well-being.⁹⁶

While acknowledging that the “County’s interest in safeguarding the psychological well-being of minors is compelling in the abstract,”⁹⁷ Judge Arnold reasoned that there was no evidence to demonstrate that the asserted harm in question — damage to the psychological well-being of minors allegedly caused by playing violent video games — was even real.⁹⁸ The judge wrote:

Before the County may constitutionally restrict the speech at issue here, the County must come forward with *empirical support* for its belief that ‘violent’ video games cause psychological harm to minors. In this case . . . the County has failed to present the ‘*substantial supporting evidence*’ of harm that is required before an ordinance that threatens protected speech can be upheld.⁹⁹

92. St. Louis County, MO., Ordinance 20,193, § 602.425(c) (2000).

93. Indianapolis, IN., General Ordinance 72-2000, § 831-1 (2000).

94. See *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003) (applying strict scrutiny).

95. *Id.*

96. *Id.* at 959.

97. *Id.* at 958.

98. See *id.* at 959 (noting lack of empirical support for County’s position).

99. *Interactive Digital Software Ass’n*, 329 F.3d at 959 (emphasis added).

The emphasized language above is critical. The Eighth Circuit has now made it clear that phantom fears of supposedly powerful media effects will not support or justify laws that restrict speech.¹⁰⁰ There must be solid evidence — “substantial supporting evidence” and “empirical support,” to use the court’s own language — before such laws can withstand judicial review.¹⁰¹ Parsed differently and more bluntly, the government must prove that an actual harm exists before it can regulate the media. If other courts outside the Eighth Circuit adopt these or similarly stringent tests, then video game ordinances will face a steep, uphill battle in the fight for constitutionality.

Applying these tests of empirical and substantial evidence to the evidence offered by St. Louis County, Judge Arnold wrote for the Eighth Circuit:

The County’s conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record. It is true that a psychologist appearing on behalf of the County stated that a recent study that he conducted indicates that playing violent video games “does in fact lead to aggressive behavior in the immediate situation . . . that more aggressive thoughts are reported and there is frequently more aggressive behavior.” But this vague generality falls far short of a showing that video games are psychologically deleterious. The County’s remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the testimony of a high school principal who admittedly had no information regarding any link between violent video games and psychological harm.¹⁰²

What is striking about this analysis is that, just as Judge Posner and the Seventh Circuit had done in *Kendrick*, Judge Arnold and the Eighth Circuit rejected the social science evidence offered by the government to support a statute targeting violent video

100. See *id.* at 959-60 (recognizing “substantial supporting evidence” is necessary).

101. See *id.* at 959.

102. *Id.* at 958-59.

games.¹⁰³ The court would not be blinded by social science, as it recognized the studies in question were “ambiguous, inconclusive, or irrelevant.”¹⁰⁴ What were those studies? Who were their authors?

Perhaps not surprisingly, the studies included some of the same evidence relied upon unsuccessfully by the City of Indianapolis in *Kendrick*.¹⁰⁵ Judge Posner wrote in that case that “[t]he social science evidence on which the City relies consists primarily of the pair of psychological studies that we mentioned earlier, which are reported in Craig A. Anderson & Karen E. Dill, ‘Personality Processes and Individual Differences — Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life.’”¹⁰⁶ Judge Posner dismissed Anderson’s studies for multiple reasons, writing that:

Those studies do not support the ordinance. There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. And they do not suggest that it is the *interactive* character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings. The studies thus are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.¹⁰⁷

Despite Judge Posner’s stern rebuke of the studies as irrelevant, St. Louis County nonetheless relied upon Professor Craig A. Anderson of Iowa State University as its expert on the effects of violent video games.¹⁰⁸ Although it is not specified in either the

103. For further discussion of rejection of social science evidence in *Kendrick*, see *supra* notes 43-44 and accompanying text.

104. *Interactive Digital Software Ass’n*, 329 F.3d at 959. (questioning insufficiency of studies presented).

105. *See* *Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001) (analyzing social studies presented in case).

106. *Id.* at 578 (citation omitted).

107. *Id.* at 578-79 (emphasis in original).

108. *See* *Interactive Digital Software Ass’n v. St. Louis Co.*, 200 F. Supp. 2d 1126, 1129 (reviewing expert’s testimony). Dr. Craig Anderson, psychology professor at Iowa State University, testified at hearings on the ordinance, and the court noted

district or appellate court opinions which of Anderson's articles the County relied upon, Judge Limbaugh wrote that "one of the articles is the publication of Dr. Anderson's study, and Dr. Anderson could testify in court regarding this study because he has personal knowledge in conducting it."¹⁰⁹

When viewed together, the rejection of social science evidence at the appellate court level in both *American Amusement Machine Association* and *Interactive Digital Software Association* should signal the death knell for the use of current, general social science research on video games to support access-limitation ordinances. After all, Professor Anderson has been described as "the nation's pre-eminent researcher on the effect of exposure to violent video games,"¹¹⁰ yet even his research could not help to support access-limitation legislation.¹¹¹ For future research to be useful and relevant to cities and states that want to suppress minors' access to video games, the studies must involve minors (not college students or adults), must involve the specific games that are regulated (not violent games generally), must *not* be conducted in artificial laboratory settings that are so far removed from reality that they lack all external validity,¹¹² and must prove actual causation (not merely

that "[i]n his testimony, Dr. Anderson referred to studies which found that violent video games caused psychological damage to children. St. Louis County provided the Court a copy of the studies referred to by Dr. Anderson." See *id.*

109. *Id.* at 1129 n.1. Elsewhere in Limbaugh's opinion, he noted that "Dr. Anderson testified regarding a study in which he and Dr. Brad Bushman had just completed concerning the playing of violent video games. He told the Council that they found that playing violent video games for as short of a time as [ten] to [fifteen] minutes does in fact lead to aggressive behavior in the immediate situation." *Id.* at 1137. Judge Limbaugh failed to note whether this study had actually been published in article form in an academic journal. See *id.* (failing to state whether article was published).

The authors of this law journal article, however, were able to locate two articles co-authored by Anderson and Bushman that summarize their research findings. See Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOL. SCI. 353 (2001); Brad J. Bushman & Craig A. Anderson, *Media Violence and the American Public: Scientific Facts Versus Media Misinformation*, 56 AM. PSYCHOL. 477 (2001).

110. Barbara F. Meltz, *Child Caring; Legislation Would Target Violence in Video Games*, BOSTON GLOBE, May 22, 2003, at H1, H8 (recognizing Professor Anderson's qualifications).

111. See E.D. Fletcher, *Bills to Target Violent Games*, SACRAMENTO BEE, Nov. 29, 2003, at <http://www.sacbee.com/content/politics/story/7869056p-8809136c.html> (discussing legislator's attempt to use social science research to back access-limitation legislation). California Assemblyman Leland Yee, who holds a Ph.D. in child psychology, justified the legislation by stating: "[t]his is all about saving our kids." *Id.*

112. See JAMES H. WATT & SJEF A. VAN DER BERG, RESEARCH METHODS FOR COMMUNICATION SCIENCE 241 (1995) (noting generalizability, or external validity, of

correlation)¹¹³ of violent conduct (not merely attitude change or aggressive tendencies).¹¹⁴ Whether such specific studies can ever be produced is highly doubtful, especially given the fact that there is now an active body of thirty-three media scholars who have banded together to file an amicus brief on behalf of the IDSA that criticized the current state of social science research, including that of Professor Craig A. Anderson, used by both St. Louis County and the City of Indianapolis.¹¹⁵ Surely, in future cases, that group will be present and ready to criticize similar studies when they are presented to support a supposedly compelling interest in preventing harm to minors allegedly caused by video games.¹¹⁶

The Eighth Circuit also rejected, as non-compelling, St. Louis County's second asserted interest behind its video game ordinance: helping parents to better serve as guardians of their children's well-being.¹¹⁷ Writing that "the government cannot silence protected

research is "the ability of its conclusions to be validly extended from the specific environment in which the research study is conducted to similar 'real world' situations"). Data obtained from an externally valid study is superior, as it can be used to predict behavior. *See id.* at 241-42.

113. *See generally* MICHAEL SINGLETARY, *MASS COMMUNICATION RESEARCH: CONTEMPORARY METHODS AND APPLICATIONS* 227 (1994) (writing "[i]t is important to recognize that correlation is not the same as causation. In other words, if two variables are correlated, it does not necessarily follow that one *causes* any change in the other") (emphasis in original).

114. *See generally* *Violence*, *supra* note 6, at 18-20 (examining issues of causation versus correlation, problems with generalized and aggregated data, and sometimes inconsistent link between knowledge, attitude, and behavior).

115. Brief of Amici Curiae of Thirty-Three Media Scholars In Support of Appellants, and Supporting Reversal, *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (on file with authors).

116. *See* Michael Rich, Testimony on neurobiological research and the impact of media and children before the Senate Commerce, Science and Transportation Committee (Apr. 10, 2003) (transcript on file with authors). That the current body of media-effects research demonstrating a correlation between viewing violent images and subsequent aggressive behavior is subject to criticism was made clear in the testimony of Dr. Michael Rich before the Senate Commerce, Science and Transportation Committee in April 2003. *See id.* Dr. Rich, who practices pediatrics and adolescent medicine at Children's Hospital Boston, teaches at Harvard Medical School and Harvard School of Public Health, and directs the Center on Media and Child Health at Harvard University, told members of the committee that:

[d]espite the preponderance and strength of findings that associate media exposure with increased aggression, fears, and desensitization to violence, the mechanism by which media actually changes those who are exposed remains unclear. Without a step-by-step understanding of how viewed violence is translated into perceptions, attitudes, and behaviors, the media exposure and effects research remains open to criticism.

Id.

117. *See* *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) (holding under circumstances of case county may not aid parents by restricting First Amendment Rights).

speech by wrapping itself in the cloak of parental authority,”¹¹⁸ the Eighth Circuit reasoned that “[t]o accept the County’s broadly-drawn interest as a compelling one would be to invite legislatures to undermine the [F]irst [A]mendment rights of minors willy-nilly under the guise of promoting parental authority.”¹¹⁹ As with Judge Posner in *Kendrick*, it is respect for the First Amendment rights of children and not just those of the manufacturers and producers of video games that ultimately led to the demise of St. Louis County’s efforts.

What surely must be frustrating for video game opponents about this staunch judicial respect for minors’ First Amendment rights of free speech, when pitted against alleged interests in parental authority, is that it contradicts what courts have been doing post-Columbine to the free speech rights of minors in another setting: schools.¹²⁰ As University of Southern California constitutional law scholar Erwin Chemerinsky observed in October 2002, “[c]ourts have very much overreacted in deferring to schools in situations where there’s really no justification for restricting speech. First Amendment rights have been tremendously jeopardized.”¹²¹ Across the country, minors in public schools are losing court battles over their free speech rights.¹²² The disturbing irony for anti-video game advocates is that while the *in loco parentis* power of schools is increasing with respect to restricting the right of minors to engage in free speech, the power of parents themselves is decreasing with

118. *Id.* The court continued:

[W]e are guided by the Supreme Court’s recognition that “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.”

Id. (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)).

119. *Id.* The court did accept the County’s interest “in safeguarding the psychological wellbeing of minors” as “Compelling in the abstract.” *Id.* at 958.

120. For a discussion of court rulings on minors’ free speech rights in schools, see *infra* note 122 and accompanying text.

121. Mike McKee, *Bad Men on Campus*, RECORDER, Oct. 31, 2002, at News.

122. See, e.g., *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002) (holding school did not violate student Josh Mahan’s First Amendment free speech right by expelling him for writing an allegedly threatening note about another student); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002) (holding school did not violate First Amendment rights of student Justin Swidler by expelling him for home-created website containing “derogatory, profane, offensive[,] and threatening statements directed toward one of the student’s teachers and his principal”).

respect to their ability to control the speech to which their children are exposed.¹²³

And St. Louis County legislators are, indeed, frustrated.¹²⁴ After the Eighth Circuit's June 2003 ruling striking down the ordinance that he first proposed back in October 2000, former Councilman Jeff Wagener wrote an opinion column for the *St. Louis Post-Dispatch*.¹²⁵ In the column, Wagener contended that the Eighth Circuit "made losers out of parents, who are trying to foster their children's well-being."¹²⁶ He claimed the ordinance "struck the right balance between the rights of the gamers to sell their products and the rights of parents who want to control what their kids are exposed to."¹²⁷ Wagener conveniently forgot to ever mention in his column that someone else, "children, with their First Amendment right to receive speech," also had rights that were at stake in the case.¹²⁸ A further examination of the rhetoric and sophistry used by Wagener and other proponents of access-limitation legislation is reserved for Part III of this article.¹²⁹

Ultimately, after the Eighth Circuit denied the St. Louis County Council's request for a rehearing of the case, the Council decided not to petition the United States Supreme Court for a writ of certiorari.¹³⁰ The reasons were, in part, financial.¹³¹ As St. Louis County Council chairman Greg Quinn told a newspaper reporter,

123. For a discussion of parents' decreasing power, see *infra* notes 123-28 and accompanying text.

124. See *Beholder*, *supra* note 1, at D6 (noting St. Louis County officials filed appeal); see also Larry Copeland, *Battle Over Violent Video Games Heating Up: Washington Case May Help Define Limits on Sales to Children*, USA TODAY, Jan. 29, 2004, at A3 (detailing proposed access-limitation laws across country). Washington State Representative Mary Lou Dickerson argues that access-limitation legislation is not censorship. See *id.* Dickerson states: "[t]here is a great deal of precedent for restricting dangerous things like alcohol and tobacco to minors" *Id.*

125. Jeff Wagener, *Score One for Violence*, ST. LOUIS POST-DISPATCH, June 9, 2003, at B7 (describing Eighth Circuit's ruling as "a blow to parents who want to be able to control what their children are exposed to in an increasingly violent society").

126. *Id.* Wagener argues that consent requirements "help parents carry out the responsibility of raising their children." *Id.*

127. *Id.* Wagener claims that "[w]e should not have to wait for more evidence, or for more children to be harmed, before we take reasonable steps to protect them." *Id.*

128. See *id.* (discussing effect of Eighth Circuit's ruling on parents).

129. See *infra* notes 301-74 and accompanying text.

130. See Michelle Kowalski, *8th U.S. Circuit Court Rules That Violent Video Games Have First Amendment Protection*, ST. LOUIS DAILY RECORD, Sept. 2, 2003 (discussing Eighth Circuit's 2003 ruling striking down St. Louis County ordinance).

131. *Id.* (discussing St. Louis County councils' reason for not appealing Eighth Circuit decision).

"[t]here are costs involved in any step in the process of appealing. We felt that since the [Eighth] Circuit made the decision the way they did that it was something best just not to pursue."¹³²

With the victories for children's First Amendment rights in both *American Amusement Machine Association* and *Interactive Digital Software Association* in mind, this article now turns to the July 2003 battle over minors' access to violent video games in the state of Washington. Although the Washington law was different from those at issue in earlier cases, the judicial outcome would ultimately be the same.

B. *Video Software Dealers Association v. Maleng*

In May 2003, a group of Washington lawmakers, led by Representative Mary Lou Dickerson, a Democrat from Seattle, successfully passed a bill designed to block the sale or rental to children under seventeen years of age of a "video or computer game that contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer."¹³³ Dickerson pompously proclaimed in a press release, "I'm proud Washington is the first state to say we have a compelling interest in keeping these ultra-violent games out of the hands of children without their parents' consent."¹³⁴

Just hours after Washington Governor Gary Locke signed the measure into law, the IDSA¹³⁵ vowed to challenge the law, calling it an "unconstitutional infringement on minors' rights."¹³⁶ The IDSA joined forces with other representatives of the video and computer software industry, led by the Encino, California-based Video

132. *Id.* (providing explanation for decision not to appeal).

133. H.R. 1009, 58th Leg., Reg. Sess. (Wash. 2003). The bill authorizes a series of fines for breaking the law. *See id.* A complete legislative history of this bill can be found on the Washington State Legislature website. *See* <http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary.cfm?billnumber=1009> (last visited Mar. 29, 2004).

134. Press Release, Locke Signs Video-Game Violence Law; First State Law in the Nation to Regulate Sales of Violent Games to Minors, *at* <http://hdc.leg.wa.gov/members/dickerson/vgsigned.asp> (last visited Aug. 27, 2003).

135. For a discussion of IDSA, see *supra* note 49 and accompanying text.

136. Dan Richman, *Law Limits Some Violent Video Games*, SEATTLE POST-INTELLIGENCER, May 21, 2003, at B1 (noting "Washington's new law is more narrowly drawn than many and so is more likely to survive judicial scrutiny"). "To survive, laws restricting expression must be very narrow in their scope and serve a legitimate purpose." *Id.* at B5.

Software Dealers Association ("VSDA"),¹³⁷ on June 5, 2003, to enjoin enforcement of the law, which was touted to be the first of its kind in the country.¹³⁸

The challenged provision was just the latest wrinkle in a more comprehensive legislative initiative that empowered the state, under its "duty to protect the public health and safety,"¹³⁹ to regulate electronic media "uses of virtual reality . . . conducive to increased violent behaviors, especially in children."¹⁴⁰ In similar fashion, the challenged bill was predicated upon a legislative finding that showed "a correlation between exposure to violent video and computer games and various forms of hostile and anti-social behavior."¹⁴¹ As discussed previously in this article, correlation¹⁴² and causation are two wholly different concepts, and courts have recognized this distinction in the video and computer game context.¹⁴³

The Washington law was unique in that it defined as "violent" only those games that depict aggressive tactics against public law

137. See Press Release, VSDA Releases Annual Report on the Home Entertainment Industry, Aug. 4, 2003, at <http://www.vsd.org/Resource.phx/public/press/august2003/august04-03.htm>. In addition to the Video Software Dealers Association and the Interactive Digital Software Association, the other plaintiffs were the Washington Retail Association, Interactive Entertainment Merchants Association, International Game Developers Association, and the Hollywood Entertainment Corporation. See *id.*

The VSDA describes itself in a recent press release available on its website as: the not-for-profit international trade association for the \$20 billion home entertainment industry. VSDA represents more than 1,500 companies throughout the United States, Canada, and a dozen other countries. Its members operate more than 12,500 retail outlets in the U.S. that sell and/or rent DVDs, VHS cassettes, and console video games. Membership comprises the full spectrum of video retailers (from single-store operators to large chains), video distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry.

Id.

138. See Richman, *supra* note 136, at B1 (describing Washington's Videogame Violence Bill). "To enforce the new law, police officers can issue a ticket on the spot if they witness an unlawful sale or rental, or the can go into court, file a written statement and obtain a ticket from the court, which they then deliver to the alleged wrongdoer." *Id.* at B5.

139. WASH. REV. CODE § 19.188.010 (2003).

140. *Id.*

141. H.R. 1009, 58th Leg., Reg. Sess. § 1 (Wash. 2003).

142. See Plaintiffs' Motion for Preliminary Injunction at 9, Video Software Dealers Ass'n v. Maleng, (W.D. Wash. 2003) (No. C03-1245L) (observing "these games are singled out for censorship because they are allegedly correlated with 'various forms of hostile and anti-social behavior' and reduce 'respect for public law enforcement officers'").

143. See *supra* notes 113-14 and accompanying text.

enforcement officers, rather than including all violent content.¹⁴⁴ VSDA argued that the narrow focus of the law amounted to regulation based solely upon the content and viewpoint of the speech.¹⁴⁵ To reach that constitutional argument, however, VSDA needed to reinforce the threshold notion that video and computer games deserved protection under the First Amendment.

VSDA compared the speech-like nature of these games to other media to argue that they are “as expressive as film, music, and the fine arts, each of which is unquestionably entitled to full First Amendment protection.”¹⁴⁶ Citing *Kendrick*¹⁴⁷ and borrowing from the *IDS* case discussed above, VSDA further argued that “[t]he fact that video games are a relatively new medium of expression makes them no less protected.”¹⁴⁸

Given the emphasis solely on violence depicted against law enforcement personnel, the state of Washington sought to restrict video and computer games with a specific anti-law enforcement bias.¹⁴⁹ In contrast, positive portrayals of law enforcement officers in video games were not regulated by the law.¹⁵⁰ For instance, the law did not restrict access to games in which a police officer shoots a criminal.¹⁵¹ VSDA viewed this legislative approach as the state’s effort “to regulate a particular category of disfavored expression based on that expression’s message and alleged impact on its viewers.”¹⁵² It further argued that basing a law on the content of speech or, “more perniciously . . . the *viewpoint* expressed by the games”¹⁵³ required “exacting First Amendment scrutiny.”¹⁵⁴

144. See *supra* note 133 and accompanying text.

145. See Plaintiffs’ Motion for Preliminary Injunction at 10, Video Software Dealers Ass’n v. Maleng, (W.D. Wash. 2003) (No. C03-1245L).

146. *Id.* at 8.

147. See *supra* notes 38-45, 67, 69, 80-82, 103, 105 and accompanying text (summarizing *Kendrick* opinion and its influence).

148. Plaintiffs’ Motion for Preliminary Injunction at 8, Video Software Dealers Ass’n v. Maleng, (W.D. Wash. 2003) (No. C03-1245L).

149. See H.R. 1009, 58th Leg., Reg. Sess. § 2(4) (Wash. 2003). The Washington statute only restricts violent video games where “the player kills, injures, or otherwise causes physical harm to . . . a public law enforcement officer.” See *id.*

150. See *id.* (noting law proscribes violent acts only against law enforcement officers). “At least 30 video games portray the killing of police officers, . . .” Richman, *supra* note 136, at B5.

151. See H.R. 1009, 58th Leg., Reg. Sess. § 2(4) (Wash. 2003). The bill’s definition of a “violent video or computer game” does not include games where persons other than police officers were killed or injured. *Id.*

152. Plaintiffs’ Motion for Preliminary Injunction at 9, Video Software Dealers Ass’n v. Maleng, (W.D. Wash. 2003) (No. C03-1245L).

153. *Id.* at 11.

154. *Id.* at 10.

The United States Supreme Court has described viewpoint-based discrimination as “an egregious form of content discrimination.”¹⁵⁵ As Stanford University Law School Dean Kathleen Sullivan and her late colleague Professor Gerald Gunther observed, “[t]he Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.”¹⁵⁶ The Court has embraced the concept of viewpoint neutrality,¹⁵⁷ while viewpoint discrimination has been scorned.¹⁵⁸

According to VSDA, the state failed to demonstrate a compelling governmental need because the interests asserted by the legislature, “curb[ing] hostile and antisocial behavior”¹⁵⁹ and “fostering respect for public law enforcement officers,”¹⁶⁰ did not approach “a constitutionally sufficient rationale.”¹⁶¹ Moreover, VSDA questioned the legitimacy of the state attempting to foster respect for itself: “[t]he government cannot suppress speech because it communicates a message of ‘disrespect’ for the government and its agents.”¹⁶² VSDA convincingly argued that the state fell short of meeting the strict scrutiny standard required for such an infringement on expression.¹⁶³

In an opinion solidifying the First Amendment protection of the computer and video game industry, U.S. District Judge Robert S. Lasnik enjoined the state of Washington from enforcing its new law, finding that the games presented as evidence to the court

155. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The Court stated “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

156. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 193 (2d ed. 2003). Sullivan and Gunther identify viewpoint restrictions as a subtype of content-based regulation. *See id.*

157. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233-34 (2000) (discussing favorably principle of viewpoint neutrality in context of First Amendment jurisprudence surrounding distribution of mandatory student activity fees at public universities).

158. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (“Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued validity of ‘free speech.’”).

159. H.R. 1009, 58th Leg., Reg. Sess. § 1 (Wash. 2003).

160. *Id.*

161. Plaintiffs’ Motion for Preliminary Injunction at 12, *Video Software Dealers Ass’n v. Maleng*, (W.D. Wash. 2003) (No. C03-1245L).

162. *Id.* at 15.

163. *See Order Granting Plaintiff’s Motion for Preliminary Injunction at 6, Video Software Dealers Ass’n v. Maleng*, (W.D. Wash. 2003) (No. C03-1245L) (discussing less restrictive alternatives as element of strict scrutiny analysis).

"[were] expressive and qualify as speech for purposes of the First Amendment."¹⁶⁴ Judge Lasnik pointed out that video games have come a long way toward being considered expression deserving of First Amendment protection, noting "early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races."¹⁶⁵ Today's games, on the other hand, "frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience."¹⁶⁶ The judge's finding required that regulation of the games' content meet the demands of the strict scrutiny test.¹⁶⁷

Judge Lasnik noted that the state, in its response to VSDA's motion, apparently abandoned the stated legislative interest of fostering respect for law enforcement "in favor of a 'public safety' focus."¹⁶⁸ The judge focused on the inferences the legislature drew from the studies it gathered as the basis for the bill, finding that "[m]ost of the studies on which the legislature relied evaluated the effects of portrayals of violence in media other than video games or studied effects on persons outside the targeted group."¹⁶⁹ Not surprisingly, similar to the Seventh Circuit in *Kendrick* and the Eighth Circuit in *IDS*, Judge Lasnik rejected the social science research of Professor Anderson.¹⁷⁰

Moreover, Judge Lasnik questioned the logic of targeting only "a single type of violent representation (harm to identifiable law enforcement officers) in a single medium (video games)" without considering "the total amount of violence to which minors are exposed" or even attempting "to regulate all of the graphic violence

164. *See id.* at 6.

165. *Id.* at 3.

166. *Id.* at 3-4.

167. *See id.* at 4 (noting state may regulate speech "to serve a compelling state interest" if regulation is "narrowly tailored"); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding content-based regulations presumptively invalid).

168. *Id.* at 5.

169. Order Granting Plaintiff's Motion for Preliminary Injunction at 6-7, *Video Software Dealers Ass'n v. Maleng*, (W.D. Wash. 2003) (No. C03-1245L) (noting one study used by legislature examined effects on college students). Because studies relied on by the state legislature informing the remedy do not focus on minors, it is unlikely that the state can show its remedy will alleviate the identified problem with minors. *See id.* at 7.

170. *See id.* at 7-8 (rejecting article published by Anderson and co-author in *Journal of Personality and Social Psychology*).

depicted in video games.”¹⁷¹ Parsed differently, the law is underinclusive in terms of serving its stated purpose.¹⁷²

Judge Lasnik also reasoned that the law simply would not “alleviate the identified problem.”¹⁷³ Viewed another way, if the state’s interest was designed to keep violent content away from minors, the law would fail because the measure would have “no effect at all on the other channels through which violent representations are presented to children,” and even violent video games would not be restricted, as “only those involving police officers would be off-limits.”¹⁷⁴ Judge Lasnik also pointed out that the law could “sweep too broadly” if the legislature intended to restrict “access to only the most vile portrayals of violence” because it would necessarily keep minors away from “games which mirror mainstream movies or reflect heroic struggles against corrupt regimes, such as ‘Minority Report: Everybody Runs.’”¹⁷⁵

Judge Lasnik found that, given the serious constitutional questions raised by the challengers of the Act, allowing the state to enforce the law — one that may very well be declared unconstitutional after a full hearing on the merits — would exact irreparable harm, even in the short-term loss of First Amendment rights.¹⁷⁶

His opinion was immediately lauded by the VSDA.¹⁷⁷ Bo Anderson, president of the VSDA, called the decision “a victory for the First Amendment rights of video retailers and their customers. It affirms that the government cannot restrict access to video games, even those that are — in the court’s words — ‘obnoxious,’ just because it doesn’t like the messages they contain.”¹⁷⁸

171. *Id.* at 7.

172. *See id.* (noting Act regulating videogames will not meet purpose of curbing violent behavior in minors because children can receive violent media in other ways). For a discussion of underinclusiveness, see *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574-75 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 109 (2002) (“The underinclusiveness of a law will violate the First Amendment where the proof establishes that the statute in question is intended to restrict disfavored expressive content while exempting the expression of favored content.”).

173. *See* Order Granting Plaintiff’s Motion for Preliminary Injunction at 7, *Video Software Dealers Ass’n v. Maleng*, (W.D. Wash. 2003) (No. C03-1245L) (noting violence in all media is not regulated by law).

174. *Id.* at 7-8.

175. *Id.* at 8.

176. *See id.* (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionable constitutes irreparable injury.”).

177. *See* Press Release, Statement of VSDA Regarding Favorable Ruling in Challenge to Washington State Video Game Censorship Law, July 11, 2003, at <http://www.vsd.org/Resource.phx/public/press/july2003/july11-03.htx>.

178. *Id.*

Despite Anderson's pronouncement, the twin First Amendment victories in the 2003 opinions described in this part of the article, and the earlier pro-First Amendment decision in *Kendrick*, legislators keep churning out bills targeting video games and, in particular, minors' access to them. The next part of this article addresses some of those measures, critiquing their constitutionality — or, better put, their “unconstitutionality” — in light of the decisions addressed above.

II. FIRING BLANKS AT VIOLENT VIDEO GAMES: A REVIEW AND CRITIQUE OF THE LEGISLATIVE LANDSLIDE

It is ironic that a favorite target of the proponents of legislation restricting minors' access to video games is the genre of so-called first-person-shooter video games¹⁷⁹ that supposedly train young boys to shoot real people with deadly accuracy.¹⁸⁰ When it comes to drafting legislation that can pass constitutional muster, however, these anti-access advocates cannot seem to shoot straight. Instead, they consistently fire legislative blanks or miss the mark.¹⁸¹ The only thing left dead after judicial review is the legislation itself.

This part of the article examines several examples of legislation pending in 2003 to determine whether legislators are improving their drafting skills when it comes to crafting anti-access video game legislation. In particular, four bills are examined: one federal bill,¹⁸² along with legislation from the states of Delaware,¹⁸³ Minne-

179. See Mike Snider, *'Doom' Returns in All its Gory*, USA TODAY, May 12, 2003, at 1D [hereinafter *Doom Returns*]. This is a genre of video game, exemplified by the game *Doom*, “in which players see through the eyes of heavily armed characters as they fire their way through enemy-filled levels.” *Id.* Adding to the irony is that these often-criticized games — Eric Harris and Dylan Klebold, who committed the violence at Columbine High School, played the game *Doom* — actually have been shown to have positive effects in sharply improving visual attention skills and leading to an “increase the brain's capacity to spread attention over a wide range of events.” Sandra Blakeslee, *Video-Game Killing Builds Visual Skills*, *Researchers Report*, N.Y. TIMES, May 29, 2003, at A1; see also Steve Galpern, *'Doom' Gurus Unmasked*, ROCKY MOUNTAIN NEWS, May 30, 2003, at 25D (describing how after it was revealed Eric Harris and Dylan Klebold had played *Doom*, first-person shooter games were condemned for causing real-life violence).

180. See *Doom Returns*, *supra* note 179, at 1D (noting first-person shooter games may train players for real-life shooting).

181. For a description of how anti-access measures have been declared unconstitutional and enjoined in three separate cases, see *supra* notes 37-178 and accompanying text (Part I).

182. See H.R. 669, 108th Cong. (2003) (“To amend [T]itle 18, United States Code, to prohibit the sale or rental of adult video games to minors.”).

183. See H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003) (“An Ace to amend Title 11 of Delaware Code Relating to Obscenity.”).

sota,¹⁸⁴ and Pennsylvania.¹⁸⁵ These bills were selected because they each embody a different method of regulation, including different definitions of the content to which minors' access is restricted.¹⁸⁶

Section A sets forth the text of each of these bills, drawing comparisons and contrasts where relevant.¹⁸⁷ Section B articulates the legislative history behind the bills in those cases where there is a clear record.¹⁸⁸ Finally, Section C analyzes and critiques each of these measures for its constitutionality.¹⁸⁹ In particular, Section C compares current legislation to that of Indianapolis, St. Louis County, and Washington State, all of which were previously enjoined for violating the First Amendment. Whereas some of the bills described below restrict access to video games involving both sexual and violent content, this article focuses only on those parts of the bills relating to violent content and imagery. A discussion of the regulation of sexual content in video games is beyond the scope of this article.

A. Recent Legislation

This section looks initially at a federal bill designed to restrict minors' access to video games. It then turns to legislation pending in Delaware, Minnesota, and Pennsylvania.

1. *The Federal Legislation*

The "Protect Children from Video Game Sex and Violence Act of 2003" provides, in relevant part, "[w]hoever sells at retail or rents, or attempts to sell at retail or rent, to a minor any video game that depicts nudity, sexual conduct, or other content *harmful to minors*, shall be fined under this chapter."¹⁹⁰ It is the term "harmful to minors" that addresses violent content in this bill and is defined to mean:

video game content that predominantly appeals to minors' *morbid interest in violence* or minors' prurient interest in sex, is patently offensive to prevailing standards in the

184. See S. 35, 83d Leg., Reg. Sess. (Minn. 2003-04) (banning sale or rental of violent video games to minors).

185. See S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003) (prohibiting minors' access to violent video games).

186. For a discussion of various definitional differences in each bill, see *infra* notes 190-224 and accompanying text.

187. See *infra* notes 190-224 and accompanying text.

188. See *infra* notes 225-48 and accompanying text.

189. See *infra* notes 249-300 and accompanying text.

190. H.R. 669, 108th Cong. § 2732 (2003) (emphasis added).

adult community as a whole with respect to what is suitable material for minors, and lacks serious literary, artistic, political, or scientific value for minors, and contains — (A) *graphic violence*, (B) *sexual violence*, or (C) strong sexual content.¹⁹¹

Within this definition of “harmful to minors” there are several other terms that are also defined in the bill, including “minor,” which is defined as “a person age 17 and younger.”¹⁹² In addition, the term “graphic violence” is defined as “the visual depiction of serious injury to human beings, actual or virtual, including aggravated assault, decapitation, dismemberment, or death.”¹⁹³ Finally, “sexual violence” is defined as “the visual depiction, actual or virtual, of rape or other sexual assault.”¹⁹⁴

At this point, it is critical to note that the proposed federal legislation uses the term “harmful to minors” to define the restricted violent content.¹⁹⁵ This particular strategy and term was also used by both the City of Indianapolis¹⁹⁶ and St. Louis County.¹⁹⁷ As noted in Part I of this article, those two ordinances were declared unconstitutional by different federal appellate courts.¹⁹⁸ Such judicial history calls into question the constitutionality of the “Protect Children from Video Game Sex and Violence

191. *Id.* § 2731(2) (emphasis added).

192. *Id.* § 2731(3).

193. *Id.* § 2731(1).

194. *Id.* § 2731(7).

195. See H.R. 669, 108th Cong. § 2731(2) (2003) (emphasis added).

196. See *Am. Amusement Mach. Ass’n v. Kentrick*, 115 F. Supp. 2d 943, 946 (S.D. Ind. 2000), *rev’d*, 244 F.3d 572, 573 (7th Cir. 2001). The City of Indianapolis used the term “harmful to minors” and defined it to mean:

an amusement machine that predominantly appeals to minors’ morbid interest in violence or minors’ prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years, lacks serious literary, artistic, political or scientific value as a whole for persons under the age of eighteen (18) years, and: (1) Contains graphic violence; or (2) Contains strong sexual content.

Id.

197. See *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1130 (E.D. Mo. 2002), *rev’d*, 329 F.3d 954 (8th Cir. 2003). St. Louis County also used the term “‘harmful to minors’” to mean:

a video game that ‘predominantly appeals to minors’ morbid interest in violence’, ‘is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, lacks serious literary, artistic, political or scientific value as a whole for minors, and contains . . . graphic violence.’

Id.

198. See *supra* notes 37-178 and accompanying text (Part I).

Act of 2003.” In fact, the Act’s definition of “harmful to minors” directly mirrors the language, which was unsuccessfully used by the City of Indianapolis.¹⁹⁹

2. *The Delaware Legislation*

Delaware House Bill No. 221, which was introduced in June 2003, provides, in pertinent part:

It shall be unlawful for a person to sell at retail or rent or attempt to sell at retail or rent, to (1) a person under the age of 17 any video game with an official rating of “M” for mature audiences or (2) a person under the age of 18 any video game with an official rating of “AO” for adult only audiences. A person attempting to purchase or rent a video game rated for mature or adults only audiences shall be required to show an identification card that provides a date of birth.²⁰⁰

In contrast to the federal bill previously described, the Delaware legislation does not use the “harmful to minors” concept in defining the video games to which it applies. Rather, it uses the video game industry’s own *voluntary* ratings guidelines — “M” (“MATURE: Content may be suitable for persons ages 17 and older. May contain mature sexual themes or more intense violence or language”)²⁰¹ and “AO” (“ADULTS ONLY: Content suitable only for adults. May include graphic depictions of sex and/or violence. Not intended for persons under the age of 18”)²⁰² — against the industry. Stated differently, Delaware essentially is transforming a voluntary system that was designed by the Entertainment Software Ratings Board “only to give consumers objective and independent information about game content, so they can make informed purchasing decisions”²⁰³ into a legal weapon that will be used to

199. See *supra* note 93 and accompanying text (setting forth Indianapolis’ definition of “harmful to minors”). The only real difference being semantic — Indianapolis defined a minor as “persons under the age of eighteen (18) years,” see *supra* note 93, while the federal legislation applies to “a person age [seventeen] and younger.” H.R. 669, 108th Cong. § 2731(3) (2003). These definitions, of course, mean the exact same thing; persons under the age of eighteen are the same people who are age seventeen and younger.

200. H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003).

201. *ESRB Game Ratings, Game Rating & Descriptor Guide*, Entertainment Software Ratings Board (“ESRB”), at http://www.esrb.org/esrbratings_guide.asp (last visited Mar. 29, 2004) [hereinafter *ESRB Guide*].

202. *Id.*

203. *ESRB Game Ratings: Frequently Asked Questions*, at http://www.esrb.org/esrbratings_faqs.asp (last visited Mar. 29, 2004).

attack that industry. The self-regulation guidelines are being turned into state law.²⁰⁴ In turn, the video game industry is being penalized for voluntarily supplying information to consumers.

The easy way out is for video game companies not to submit their games for voluntary ratings. The Delaware legislation, however, wisely anticipates this potential skirting of the potential law by providing that:

No owner, operator or employee of a business shall sell, rent or otherwise provide to another a video game unless the official rating of the video game is clearly displayed on the outside of its cassette, case jacket or other covering. If the video game has no official rating, the video game shall be clearly and prominently marked as "not rated."²⁰⁵

Finally, the legislation makes any violation of the proposed statute a Class A misdemeanor.²⁰⁶

3. *The Minnesota Legislation*

Minnesota Senate Bill No. 35, introduced in January 2003 and referred to the Commerce and Utilities Committee at that time, provides that "[n]o person may sell or rent a restricted video game to a person under 17 years of age,"²⁰⁷ and defines "restricted video game" as "a video game rated AO or M by the Entertainment Software Rating Board."²⁰⁸ The bill takes the same track as that followed in Delaware, to the extent that it uses the video game industry's own voluntary ratings guidelines as the legal yardstick against which restricted content is to be judged.

There is, however, a critical age-based difference between the two statutes. Whereas the Delaware bill described previously in Section 2 makes an age-based access distinction between video games rated "M" and those rated "AO," the Minnesota bill does not distinguish between the two. In particular, the Delaware bill denies access to games rated "M" to those under *seventeen* years of age while it denies access to games rated "AO" to those under *eighteen* years of age. What does this mean in terms of its practical effect? It means

204. See H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003). The bill provides that the term "official rating" used in the proposed statute "means the rating of the Entertainment Software Rating Board." *Id.*

205. *Id.* (requiring clear display of video game rating).

206. *Id.* ("A person who violates this section shall be guilty of a Class 'A' misdemeanor.").

207. S. 35, 83d Leg., Reg. Sess. (Minn. 2003-04).

208. *Id.*

that seventeen-year-old minors in Delaware have legal access to games rated "M" but *not* to games rated "AO." Seventeen, then, is the key swing or shift year in Delaware.

In contrast, there is no such distinction made in the Minnesota legislation. Minnesota treats games rated "M" and "AO" as if they were the same in terms of access restrictions. In particular, everyone under the age of seventeen in Minnesota is denied access to *both* "M" and "AO" games, and everyone age seventeen and older is permitted access to those games. Thus, under the legislation pending in both states, a seventeen-year-old minor in Minnesota has a legal right of access to games rated "AO" and "M" while another similarly situated seventeen-year-old minor who happens to reside in Delaware has access only to games rated "M." Seventeen-year-old video game fans would much rather live in Minnesota than in Delaware were the two bills to become law. The apparent arbitrariness of the age cut-off points is discussed in Section C.

The Minnesota legislation is thus less precise and less well-drafted than the Delaware legislation, yet it yields a greater right to receive speech, for seventeen-year-olds. The Delaware legislation, in contrast, recognizes and tracks the same age-based distinction made by the Entertainment Software Rating Board ("ESRB") in defining "M" and "AO" rated games, which use age seventeen as the pivotal age at which games rated "M" "may be suitable" but for which games rated "AO" are "not intended."²⁰⁹

A final word about the legislation pending in Minnesota is important to note. In particular, a related bill, Senate Bill No. 1140, actually criminalizes minors who purchase these games.²¹⁰ In particular, it provides that "[a] person under the age of 17 who knowingly rents or purchases a restricted video game is guilty of a petty misdemeanor and is subject to a fine of not more than \$25."²¹¹ Minnesota is thus unique among states as it targets both the *supply* and *demand* sides of the video game equation by going after both dealers and buyers. Senate Bill No. 1140 also requires stores that sell video games to post a sign on the premises stating that "[i]t is against the law for a person under 17 to rent or purchase a video game rated AO or M. Violators may be subject to a \$25 penalty."²¹²

209. See *supra* notes 201-02 and accompanying text (defining "M" and "AO" ratings categories).

210. See S. 1140, 83d Leg., Reg. Sess. (Minn. 2003-04) (penalizing minors with misdemeanor).

211. *Id.*

212. *Id.*

4. *The Pennsylvania Legislation*

Pennsylvania Senate Bill No. 822, introduced and referred to the Judiciary Committee in June 2003, provides in relevant part that “[a] person commits a summary offense if the person sells, rents or otherwise provides for use for a charge any violent video or computer game to a minor.”²¹³ The bill defines a “violent video game” as one “that contains realistic or photograph-like depictions of aggressive conflict in which the player kills, injures or otherwise causes physical harm to a human form”²¹⁴ and defines a “minor” as “[a]ny person under 18 years of age.”²¹⁵ The bill also requires stores to use the most recent ESRB evaluations for the games.²¹⁶

The Pennsylvania bill differs significantly from each of the other three bills previously discussed in terms of how it defines the specific violent content to which minors are denied access. In contrast to the federal “Protect Children from Video Game Sex and Violence Act of 2003,” the Pennsylvania definition of “violent video game” does *not* rely on the harmful-to-minors concept or terminology such as that unsuccessfully employed by the City of Indianapolis and St. Louis County.²¹⁷ Unlike the legislation in both Delaware and Minnesota, the Pennsylvania bill does *not* rely on the ratings of “M” and “AO” voluntarily supplied and applied to games by the ESRB.

Instead, Pennsylvania’s definition of proscribed violent content closely tracks, with one important exception, that of the now-enjoined Washington legislation. The Washington bill defined a “violent video game” as one that “contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”²¹⁸ Likewise, the Pennsylvania bill uses the language “contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures or otherwise causes physical harm to a human form.”²¹⁹ The critical difference is at the tail end of the Washington bill’s language, which more narrowly tailors the class of human forms to *only* those who appear

213. S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003).

214. *Id.* (defining “violent video game”).

215. *Id.* (defining “minor”).

216. *See id.* (requiring “the most recent listings of the Entertainment Software Rating Board for the inspection and review by any potential purchaser”).

217. *See supra* notes 88-116 and accompanying text.

218. H.R. 1009, 58th Leg., Reg. Sess. (Wash. 2003).

219. S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003).

to be public law enforcement officers. The Pennsylvania bill makes no distinction as to human form.

Why is this difference important? First, the Pennsylvania legislature's failure to limit the restriction to physical harm done to law enforcement officers might actually help to improve the potential constitutionality of its measure. In particular, this limiting omission eliminates the viewpoint-based problem that was present in the Washington bill previously discussed in this article.²²⁰ On the other hand, the Pennsylvania's failure to limit the class of individuals makes the bill less narrowly tailored and thus less likely to survive a strict scrutiny challenge.²²¹

Another important difference between the Pennsylvania legislation and that of both Delaware and Minnesota involves the specific age at which minors are denied access to video games. While the Pennsylvania bill defines a minor as "[a]ny person *under 18* years of age,"²²² the Minnesota bill applies only "to a person *under 17* years of age."²²³ This means that a seventeen-year-old video game player would be subject to the access restrictions of the bill in Pennsylvania but *not* subject to those in the Minnesota legislation. Delaware splits the difference by allowing seventeen year olds access to games rated "M" but not to those rated "AO."²²⁴ The arbitrariness of such age-based distinctions is explored in Section C.

With the terms of the federal, Delaware, Minnesota, and Pennsylvania legislation targeting access to video games in mind, this article now turns to the legislative history behind each of those bills.

B. The Legislative History

The legislative history described in this section was gleaned from a number of sources, including the following: (1) statements made in press releases and newspaper articles by the bills' sponsors; (2) the text, in some cases, of the bills themselves, where legislative findings were included; and (3) committee reports.

220. See *supra* notes 144-63 and accompanying text (describing arguments of Video Software Dealers Association relating to viewpoint-based nature of Washington law).

221. See *supra* notes 51-52 and accompanying text (describing strict scrutiny standard of judicial review to which content-based laws are subject).

222. S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003) (defining minor) (emphasis added).

223. S. 35, 83d Leg., Reg. Sess. (Minn. 2003) (emphasis added) (noting affected age group).

224. See H.R. 221, 142d Gen. Assem., Reg. Sess. (Del. 2003) (noting ratings of ESRB).

1. *The Federal Legislation*

The “Protect Children from Video Game Sex and Violence Act of 2003” is actually the second effort by Representative Joe Baca to regulate minors’ access to violent video games. He proposed a similar measure in May 2002.²²⁵ That bill died in the House Subcommittee on Crime, Terrorism, and Homeland Security after gaining thirty-five co-sponsors.²²⁶

The 2003 measure, House Bill No. 669, proposed in February of that year, gained more than forty co-sponsors and was sent to the House Subcommittee on Crime, Terrorism, and Homeland Security in March 2003, where no further action was taken.²²⁷ The Congressional findings embodied in the bill, which constitute its formal legislative history, specifically refer to social science evidence for support. In particular, the bill provides that:

On July 26, 2000, six of the Nation’s most respected public health groups, including the American Medical Association, the American Academy of Pediatrics, the American Academy of Family Physicians, and the American Academy of Child and Adolescent Psychiatry, found that viewing entertainment violence can lead to increases in aggressive attitudes, behaviors, and values, particularly in children.²²⁸

Here, it is important to note the broad generality of this appeal to social science: “[v]iewing entertainment violence can lead to increases in aggressive attitudes, behaviors, and values, particularly in children.”²²⁹ The findings do not refer specifically to video games, but rather to entertainment violence generally. Furthermore, the phrase “can lead” suggests that the result in question does *not* always happen; in some cases, it may not lead to increases in aggressive attitudes, behaviors, and values. The bottom line is that the exact same type of generalized use of social science research to sup-

225. See Protect Children from Video Game Sex and Violence Act of 2002, H.R. 4645, 107th Cong. (2002) (noting bill introduced by Representative Joe Baca on May 2, 2002).

226. See Bill Summary & Status for the 107th Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04645:@@X> (last visited Mar. 29, 2004) (showing no further action taken in House Subcommittee on Crime, Terrorism, and Homeland Security).

227. See Bill Summary & Status for the 108th Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00669:@@X> (last visited Mar. 29, 2004) (showing no further action taken in House Subcommittee on Crime, Terrorism, and Homeland Security).

228. H.R. 669, 108th Cong. (2003) (noting congressional findings).

229. *Id.* (describing findings backing bill).

port legislation was specifically rejected by two different federal appellate courts considering similar legislation — the Seventh Circuit in *American Amusement Machine Association*²³⁰ and the Eighth Circuit court of appeals in *Interactive Digital Software Association*.²³¹ Therefore, it is highly doubtful that the use of such general social science evidence can prove the type of compelling government interest that would be necessary for the federal legislation to pass constitutional muster.

The congressional findings that accompany Representative Baca's bill go beyond the mere recitation of social science evidence that supposedly demonstrates harm. The findings also include facts designed to demonstrate that minors have access to violent video games that are not intended for their use and that cause them harm. In particular, the bill provides in its Congressional findings section that "[t]he ratings and content descriptors of video and computer games issued by the entertainment industry reflect the notion that certain video and computer games are suitable only for adults due to graphic depictions of sex or violence" and that "a study by the Federal Trade Commission showed that retailers allowed 78 percent of unaccompanied minors, ages 13 to 16, to purchase games rated as 'Mature' by the Entertainment Software Rating Board."²³²

What is interesting is that the *voluntary* ratings system of the Entertainment Software Ratings Board is now being turned against the video game industry. Minors are able to purchase games that the industry's own guidelines suggest are not suitable for them.

2. *The Delaware Legislation*

The official legislative history of this bill, which passed out of the Judiciary Committee on June 18, 2003, is sparse. However, some things are clear. First, the primary sponsor of the Delaware legislation, Helene M. Keeley, is not a friend to the entertainment industry. In addition to sponsoring legislation restricting minors' access to violent video games, she also introduced another media-related bill in 2003, which targets music. Specifically, House Bill No. 220 provides, in relevant part:

230. For a discussion of *American Amusement Machine Association*, see *supra* notes 37-45 and accompanying text.

231. For a discussion of the St. Louis County ordinance and the Eighth Circuit's decision in *Interactive Digital Software Ass'n*, see *supra* notes 46-132 and accompanying text.

232. H.R. 669, 108th Cong. (2003) (describing findings backing bill).

No owner, operator or employee of a business shall sell, rent or otherwise provide any recorded music or other recorded materials such as cassettes and compact discs that has [sic] a parental advisory label identifying the music or material as having explicit lyrics or explicit contents to any person who is less than eighteen years of age.²³³

Another piece of legislative history on the Delaware video game bill is revealed in the Judiciary Committee's official report on the bill. The report provides that "[e]nforcement of violations of this bill would be done in a self-monitoring manner; businesses would be responsible for enforcing the standards set forth in the bill. If a violation occurs, the customer would file a complaint with the Attorney General's Office which would then investigate the complaint."²³⁴ This report suggests that the government will not actively enforce this measure, indicating that its true intention is merely to serve as legislative window dressing.

3. *The Minnesota Legislation*

Minnesota Senate Bill No. 35 has its roots in similar legislation that was also proposed by Senator Sandy Pappas and that was defeated by the Minnesota Senate Commerce Committee in a 6-6 vote in 2000.²³⁵ Senator Pappas blamed the prior defeat on what she called "a tough committee — a conservative committee,"²³⁶ and suggested the influence of video game lobbyists by noting that "there are a lot of powerful lobbyists around this place."²³⁷ Apparently unfazed by this defeat, Senator Pappas introduced Senate Bill No. 35 in 2003. This new effort was also defeated; this time, however, by a vote of "8-5 in the Senate Commerce and Utilities Committee."²³⁸

233. H.R. 220, 142d Gen. Assem., Reg. Sess. (Del. 2003) (describing prohibited conduct).

234. House of Representatives, Committee Report, Del. House Bill 221, *available at* <http://www.legis.state.de.us/Legislature.nsf/fsLIS?openframeset&Frame=MAin&Src=/LIS/LIS142.NSF/Home?Openform> (last visited Mar. 29, 2004) (changing business with enforcing law).

235. *See Happenings Thursday at the Minnesota Capitol*, ASSOC. PRESS STATE & LOCAL WIRE, Mar. 2, 2000 (describing bill and vote of Commerce Committee).

236. *Id.* (quoting Senator Sandy Pappas). Senator Allan Spear said "that the bill amounted to 'censoring' and that it would treat the symptoms, not the cause, of violent children." *Id.*

237. *Id.* (quoting Senator Sandy Pappas).

238. *Happenings in the 2003 Legislative Session*, ASSOC. PRESS STATE & LOCAL WIRE, Mar. 6, 2003 (noting defeat of new measure in Senate).

In contrast, Senate Bill No. 1140, which targets children who purchase video games by subjecting them to petty misdemeanor fines, passed by an overwhelming 53 to 8 vote in the Minnesota Senate in May 2003.²³⁹ The measure had not gone further at the time this article was written, as its companion measure, House Bill No. 1492, remained in the House Judiciary Committee until adjournment.²⁴⁰ When the Senate bill passed, Senator Pappas revealed in her comments that the legislative intent of the bill actually is *not*, despite its plain terms, to fine minors who purchase games rated “M” and “AO.” Senator Pappas told one reporter that she “doubts that any children would actually be hit with fines if the bill were enacted.”²⁴¹ Rather, Senator Pappas was more concerned that the in-store signs warning of the possible fines would “really educate kids and parents.”²⁴²

4. *The Pennsylvania Legislation*

Pennsylvania Senate Bill No. 822 includes specific legislative findings that make clear the interests that undergird the bill. In particular, the bill provides that the legislature “recognizes that, as confirmed by current scientific data, the repeated exposure to graphic violence and participation in violent interactive games may contribute to violent behavior by our youth and desensitizes them to acts of violence.”²⁴³ The governmental interests revealed here are twofold.

The first interest relates to the phrase “violent behavior by our youth” and can be thought of as a *harms-to-others* interest. In particular, the phrase “violent behavior by our youth” suggests that the Pennsylvania legislature is concerned with preventing the harm to all people — regardless of their age or whether they play video games — who happen to come into contact with the Pennsylvania children who play violent video games. Youthful players, as the bill tells us, may engage in “violent behavior” against those people.

The second interest revealed in the legislative history relates to the phrase “desensitizes them to acts of violence” and can be

239. Conrad deFiebre, *Video-Game Rules Advance a Level*, STAR TRIB. (Minneapolis), May 9, 2003, at 5B (noting passage of anti-access measure in Minnesota Senate).

240. H.R. 1492, 83d Gen. Assem., Reg. Sess. (Minn. 2003-04).

241. deFiebre, *supra* note 239, at 5B (commenting on probable non-enforcement of law).

242. *Id.* (quoting Senator Sandy Pappas).

243. S. 822, 2003 Gen. Assem., Reg. Sess., at ¶ 6 (Pa. 2003) (noting desensitization of youth to violence).

thought of as a *harms-to-players* interest. The injury the government seeks to prevent here is to the video game players themselves. Youthful players are, according to the bill, harmed and desensitized to violence through the mere act of playing the games, regardless of whether they ever commit acts of violence against others.

The Pennsylvania legislation also is notable because, like the Congressional findings in the federal legislation,²⁴⁴ its legislative history appeals to social science evidence for support in demonstrating that the twin government interests described above — harm to others and harm to players — are indeed real and compelling. To this extent, the phrase “confirmed by current scientific data” is used in Pennsylvania Senate Bill No. 822. But as described in Part I of this article, appeals to social science evidence to support access-restriction legislation proved futile for the City of Indianapolis, St. Louis County, and the state of Washington.²⁴⁵

Finally, the Pennsylvania legislature drafted into the bill a legislative finding that simply is not supported by any evidence, a finding that would surely be rejected by any court. In an apparent effort to demonstrate a link between crime in society and minors who play video games, Senate Bill No. 822 provides that “[t]he General Assembly recognizes that violent crime is a serious and persistent problem in our society, especially among our youth.”²⁴⁶ The fact is that “violent crime and property crime are at a low not seen since 1973.”²⁴⁷ As the *St. Louis Post-Dispatch* opined in an editorial:

The Justice Department says that crime in America dropped last year to the lowest level since the department began surveying it 30 years ago. The crime rate has been dropping steadily for a decade. The department said that 23 of every 1,000 Americans last year were victims of violent crime including rapes, robberies and assaults. That compares to 50 of every 1,000 Americans in 1993. The rate for property crimes, such as car theft and burglary,

244. For a discussion of the findings of the federal legislation, see *supra* notes 228–28 and accompanying text.

245. For a discussion of legislation or ordinances invalidated by various federal courts, see *supra* notes 37–178 and accompanying text.

246. S. 822, 2003 Gen. Assem., Reg. Sess., ¶ 6 (Pa. 2003) (noting crime problem among youth).

247. Alexandra Marks, *A Drop in Violent Crime That's Hard to Explain*, CHRISTIAN SCI. MONITOR, Aug. 25, 2003, at 1 (noting historical lows for violent crime). Violent crimes decreased 54% from 1993 to 2002. *Id.*

was 159 for every 1,000 people last year, compared to 319 in 1993.²⁴⁸

The next section turns from the text and legislative history of the bills to a substantive critique of their constitutional merits.

C. Analysis and Critique

This section identifies several legal flaws with the four bills described in Sections A and B above.

1. *Failure to Show Compelling Interest through Social Science*

All of the bills described in Part II single out a specific subject matter or type of content for regulation. The bills employ different definitions to define that content. The federal legislation defines it in terms of material that is "harmful to minors."²⁴⁹ The Delaware and Minnesota bills borrow the ESRB's definitions of Mature and Adult-Only content,²⁵⁰ while the Pennsylvania bill fashions its own definition closely akin to that of the failed Washington state law.²⁵¹ Should any of these bills become law, each would be subject to the strict scrutiny standard of judicial review against which the laws in Indianapolis, St. Louis County, and Washington were measured.

This constitutional test contains a deliberately high hurdle, essentially posing the following question: Is the government's interest so critically important that it justifies a restriction on the fundamental right of free speech? Courts do not take that question lightly, and, in the video game lawmaking context, meeting the compelling interest requirement has proven to be a daunting task.²⁵²

While there are differences in language and boundaries of protection among the federal and state measures described above, the core of each of these legislative initiatives is designed to protect the psychological well-being of minors who play violent video games

248. *The Mean Streets of . . . Paris?*, ST. LOUIS POST-DISPATCH, Sept. 3, 2003, at B6 (noting modern lows of crime levels in United States). In May 2004, the FBI reported that violent crime in the U.S. dropped by 3.2 percent in 2003. Fox Butterfield, *Violent Crime Dropped by 3 percent in 2003*, N.Y. TIMES, May 25, 2004, at A22.

249. For a discussion of the content covered by the federal legislation, see *supra* notes 190-95 and accompanying text.

250. For a discussion of the content covered by the Delaware bill, see *supra* notes 200-06, 209 and accompanying text. For a discussion of the content covered by the Minnesota bill, see *supra* notes 207-08, 210-12 and accompanying text.

251. For a discussion of the content covered by the Pennsylvania bill, see *supra* notes 213-17, 219, 222 and accompanying text.

252. For a discussion of legislation or ordinances restricting minors' access to video games invalidated by various federal courts, see *supra* notes 37-178 and accompanying text.

and, in at least one instance, to protect the physical safety of those who come into contact with these youngsters.²⁵³ As this article previously discussed in detail,²⁵⁴ the government has often turned to social science to show the harmful effects associated with playing violent video games. For the most part, courts have remained unimpressed, and, when challenged, these laws will ultimately succeed or fail based on how strongly the findings support the specific harms underlying the statute. Relying on faulty correlations to provide the necessary link between the video game-playing behavior and the resulting harm will not pass constitutional muster.²⁵⁵

Although the judicial experience in examining video game legislation is a relatively limited, courts have honed in on the purported government interest with remarkable consistency. The short history seen in the line of cases described throughout this article makes it clear that when social science is used to support the government's claim of a *compelling* interest in protecting children from the alleged aggressiveness, courts will demand evidence that directly and credibly supports the government's thesis.

Generic studies provide little help to courts. As previously discussed,²⁵⁶ Judge Posner found the studies presented in the *Kendrick* case irrelevant, in large part because there was "no indication that the games used in the studies [we]re similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis."²⁵⁷ Likewise, the court in *IDSA* considered the testimony of a psychologist, who purportedly found a link between playing video games and aggressive behavior, a "vague generality" that fell "far short of a showing that video games are psychologically deleterious."²⁵⁸ The court had even harsher words for the remainder of the social science evidence presented by St. Louis County,

253. For a discussion of the federal findings, see *supra* notes 43-44 and accompanying text. For a discussion of the Pennsylvania findings, see *supra* note 243 and accompanying text.

254. For a discussion of the use of social science to justify access-limitation legislation, see *supra* notes 43-44, 103-16 and accompanying text.

255. For a discussion of the failure of social science to provide protection to access-limitation laws against constitutional attack, see *supra* notes 110-14 and accompanying text.

256. For a discussion of *Kendrick*, see *supra* notes 37-45 and accompanying text.

257. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) (repudiating social science research on violent video games).

258. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (stating County had failed to present the "'substantial supporting evidence' of harm that is required before an ordinance that threatens protected speech can be upheld").

labeling the additional studies “ambiguous, inconclusive, or irrelevant” largely because they were conducted on adults rather than on minors.²⁵⁹

In short, social science evidence that relies upon common sense or intuitive hypotheses but does not prove a *causal* relationship does little to advance the government’s compelling interest argument, and courts appear willing to summarily dismiss it.

2. *Failure to Provide for Parental/Guardian Consent Exceptions*

Each of the four bills previously described is content-based and thus would be subject to the strict scrutiny standard of judicial review.²⁶⁰ Part of that standard, the part that focuses on the means used to carry out the government’s interest(s), requires the governmental entity that is restricting speech to demonstrate that the statute in question is “the least restrictive means of advancing that interest.”²⁶¹ As the Supreme Court has stated, “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”²⁶²

If, as Part III explains, the advocates of the current raft of legislation simply want to help parents be better parents and not to restrict the First Amendment,²⁶³ then bills should be drafted to include specific provisions allowing minors to purchase the restricted video games if they have parental consent. Yet none of the four bills described in Part II includes such an exception that would give minors greater rights to receive speech that their parents deem appropriate for their consumption.

The addition of such an exception would help to make the bills more narrowly tailored; yet even such an exception is not a guarantee of success. As the *Kendrick* case suggests, “conditioning a minor’s First Amendment rights on parental consent of this nature

259. *Id.* (requiring County to present “empirical support for its belief that ‘violent’ video games cause psychological harm to minors”).

260. For a discussion of the standard of review applied to content-based discrimination, see *supra* note 44 and accompanying text.

261. *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) (overturning Child Online Protection Act provisions “not narrowly tailored to achieve the Government’s compelling interest in protecting minors from harmful material”).

262. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) and *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (noting First Amendment does not permit restricting speech “without an adequate justification”).

263. For a discussion of the pro-parent advocacy behind anti-access legislation, see *infra* notes 303-19 and accompanying text (Part III, Section A).

is a curtailment of those rights.”²⁶⁴ Moreover, the federal courts have recognized that while parents ultimately decide how they wish to raise their children, the government may not “limit First Amendment rights as a means of aiding parental authority,”²⁶⁵ nor can it be said that “the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to the government to regulate what minors read and view.”²⁶⁶

Despite the overwhelming constitutional odds against positioning parental consent as a condition, it may find some judicial support as a narrowing construction. Regardless, the provision should be prescribed for any legislation premised upon the government interest of assisting parents in doing their jobs.

3. *Arbitrary Age Variations and the Failure to Narrowly Tailor*

In August 2003, a federal judge in Kansas City, Missouri, issued an injunction preventing the enforcement of a state law²⁶⁷ that raised “the minimum age for nude dancers from 18 to 19.”²⁶⁸ The attorney for an adult entertainment club called Bazooka’s had argued to the court that the “minimum-age law was arbitrary.”²⁶⁹ United States District Judge Otrrie Smith “questioned why there would be any greater secondary effects from 18-year-olds dancing nude than from 19-year-olds.”²⁷⁰

While nude dancing and playing video games are obviously quite different activities, the same arbitrariness of the minimum age limit that plagued Missouri’s dancing statute²⁷¹ ultimately besets

264. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) (calling parental consent-based rights illusory “to a considerable extent”).

265. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (declining to recognize county’s asserted compelling interest in assisting “parents to be the guardians of their children’s well-being”).

266. *Id.* at 959-60 (interpreting *Ginsberg v. New York*, 390 U.S. 629 (1968)).

267. MO. REV. STAT. § 573.509 (2003) (making violation of statute Class “A” misdemeanor).

268. *Judge Blocks Enforcement of Law Barring 18-Year-Olds from Dancing Nude*, ASSOC. PRESS STATE & LOCAL WIRE, Aug. 28, 2003 (noting law “appears to be a violation of the First Amendment right to free expression”).

269. *Id.* The attorney “acknowledged that the government could regulate nude dancing but said the statute impinged too much on the right of free speech.” *Id.*

270. *Id.* (noting disparate treatment of non-minors). The judge prevented enforcement of the statute, lest the dancers suffer irreparable harm. *See id.*

271. The law initially was buried deep in Missouri Senate Bill No. 298, which was signed into law in July 2003 and provides in relevant parts that “no person less than nineteen years of age shall dance in an adult cabaret . . . nor shall any proprietor of such establishment permit any person less than nineteen years of age to dance in an adult cabaret.” S. 298, 92d Gen. Assem., 1st Reg. Sess. (Mo. 2003); MO. REV. STAT. § 573.509 (2003). An “adult cabaret” is defined under Missouri law

the video game legislation that has cropped up across the United States. As clearly demonstrated in Section A, pending state legislation is anything but consistent when it comes to the specific age or ages at which minors are allowed or denied access to violent video games.²⁷² For instance, Pennsylvania would prohibit access for a “person *under 18 years of age*,”²⁷³ while Minnesota would do so for a “person *under 17 years of age*.”²⁷⁴

The problem here is not just that different states set different age standards. It is also that those standards themselves are arbitrary. Why not restrict access only for minors under 13 years of age? Why not under 14 or under 15 or under 16? What is so magical, from a legal perspective, about minors under the age of 17? Why should they be subject to restriction? States never offer any explanations in their respective legislative records for why they chose the particular age barriers used. In addition, states fail to offer any proof — social science or otherwise — that the age barriers they have set are justified or make sense.

Data from the automobile industry, although completely unrelated to video games, may be useful. The data help to illustrate the absurdity of the age limits set forth in the video game legislation. Ironically, states will let teenagers drive at age sixteen, yet will not let them, under pending legislation, play video games.²⁷⁵ Which activity is more dangerous or potentially violent for sixteen-year-olds, driving cars or playing video games? The facts are, according to the Insurance Institute for Highway Safety, that “teenage drivers represent a major hazard,” with the risk of crash involvement “highest at age 16.”²⁷⁶ The data also reveal that 821 sixteen-year-olds died in passenger vehicles in 2001. More importantly, “among peo-

as “a nightclub, bar, restaurant, or similar establishment in which persons appear in a state of nudity in the performance of their duties.” MO. REV. STAT. § 573.500 (2003).

272. For a discussion of the differences on the cutoff ages for access to restricted video games, see *supra* notes 17-21 and accompanying text.

273. S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003) (emphasis added) (forbidding sale of restricted video games to people under eighteen).

274. S. 35, 83d Leg., Reg. Sess. (Minn. 2003-04) (emphasis added) (forbidding sale of restricted video games to people under seventeen).

275. For instance, in Pennsylvania, a sixteen-year-old boy or girl may be issued a so-called “junior driver’s license.” 75 PA. CONS. STAT. § 1503 (2003). Yet the pending video game legislation in that same state restricts access to violent video games for a “person under [eighteen] years of age.” S. 822, 2003 Gen. Assem., Reg. Sess. (Pa. 2003) (emphasis added). For a discussion of the differences in cutoff ages between Pennsylvania and Minnesota, see *supra* notes 15, 19 and accompanying text.

276. *Fatality Facts: Teenagers: 2002*, Insurance Institute for Highway Safety & Highway Loss Data Institute, at http://www.iihs.org/safety_facts/fatality_facts/

ple of all ages, 20 percent of passenger deaths in 2001 occurred when a teenager was driving.”²⁷⁷ Why is this important? Because teenagers accounted for only “10 percent of the U.S. population in 2001.”²⁷⁸

Given that a motor vehicle is far more dangerous in the hands of a sixteen-year-old boy or girl than is a video game, and given that sixteen-year-olds are permitted legal authorization to a motor vehicle with a driver’s license or junior driver’s license,²⁷⁹ it makes absolutely no sense to restrict the access of minors who are sixteen to video games that depict images of violence. If sixteen-year-olds can drive cars, they should be allowed to play video games.

What about guns and minors’ access to them? In Pennsylvania, the same place where state Senator Jack Wagner has proposed the anti-access video game legislation described above,²⁸⁰ a child as young as twelve years old can obtain a so-called junior hunting license. In particular, Pennsylvania law provides for the issuance of junior hunting licenses:

to residents who have reached or will reach their 12th birthday in the license year of application for a license but who have not reached their 17th birthday prior to the date of the application for the license and who present a written request, bearing the signature of a parent or guardian, for the issuance of a license. The actual hunting privileges granted to the holder of a junior license shall not be exercised until that person in fact is 12 years of age.²⁸¹

Moreover, under statutory law, the Pennsylvania Game Commission actually has an affirmative legal duty to “initiate, implement and administer two or more junior license hunter projects for the purpose of increasing and sustaining interest in hunting among young persons of this Commonwealth.”²⁸² Therefore, a minor in Pennsylvania can — in fact, is encouraged to — take a gun into the woods and shoot animals. But, according to Senator Wagner, soci-

teens.htm (last visited Mar. 29, 2004) (explaining “[c]rash rates are high largely because of young drivers’ immaturity combined with driving inexperience”).

277. *Id.* (noting “[s]ixty-one percent of teenage passenger deaths in 2002 occurred in crashes in which another teenager was driving”).

278. *Id.* (observing teenagers in 2002 accounting for “14 percent of motor vehicle deaths”).

279. *See supra* note 275 (referring to concept in Pennsylvania of junior driver’s license).

280. *See supra* notes 16-21, 243-48 and accompanying text.

281. 34 PA. CONS. STAT. § 2705 (2003).

282. 34 PA. CONS. STAT. § 327 (2003).

ety needs to protect that same minor from playing video games that depict the fake shooting of cartoon and pixilated images of guns. Further, a 17-year-old boy or girl in Pennsylvania is considered an “adult” for hunting purposes,²⁸³ but that child would be a minor, and thus unable to play a violent video games, under Wagner’s legislation.

Likewise, if the overwhelming majority of states (48, in fact) allow sixteen-year-olds to get married,²⁸⁴ then surely sixteen-year-olds should be allowed to play video games. It would be difficult to justify a government official telling a sixteen-year-old boy, with a straight face, “You’re old enough to take on the responsibilities of marriage, son, but I’m sorry to say that you’re not old enough to play a game with cartoon and pixilated images.”

If anything, the age-barrier limits must be lowered substantially if anti-access video game legislation is ever to have a chance of surviving constitutional scrutiny. Age barriers must be much more narrowly tailored, restricting access to speech only for those minors who truly are harmed by it — and this will be up to the states to prove, not free speech advocates.

4. *Vagueness of Definitions Borrowed from the ESRB Ratings*

A law will be declared unconstitutionally vague if “men of common intelligence must necessarily guess at its meaning and differ as to its application.”²⁸⁵ In contrast, a law will not be declared void if “anyone of ordinary intelligence can grasp its import.”²⁸⁶

While all four bills discussed in this article are easily susceptible to challenges on the ground that their definitions of restricted violent content are defined too vaguely,²⁸⁷ the bills of both Delaware

283. See 34 PA. CONS. STAT. § 2705 (providing Pennsylvania may issue “[a]dult resident hunting licenses to residents who have reached their 17th birthday but have not reached their 65th birthday”).

284. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002) (citing U.S. National Survey of State Laws 384-88 (R. Leiter ed., 3d ed. 1999), noting “48 States permit 16-year-olds to marry with parental consent”).

285. *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The court goes on to note that “laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.” *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

286. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002), *petition for reh’g en banc denied*, 320 F.3d 682 (7th Cir. 2003).

287. For instance, what do the terms “aggressive conflict” and “otherwise causes physical harm” used in the Pennsylvania legislation described earlier really mean? See *supra* notes 213-16. Aggressive conflict could be as mild as one character pushing another character, while physical harm could be a bruise or paper cut.

and Minnesota merit discussion here. Why? Because these bills do not provide their own definitions of the restricted content, but choose, instead, to rely on the definitions for “M” and “AO” rated games as defined by a private entity, the ESRB.²⁸⁸

The ESRB ratings require examination under the void for vagueness doctrine. The “M” rating is currently defined as “[c]ontent may be suitable for persons ages 17 and older. May contain mature sexual themes or more intense violence or language,”²⁸⁹ while the “AO” rating is defined as “[c]ontent suitable only for adults. May include graphic depictions of sex and/or violence. Not intended for persons under the age of 18.”²⁹⁰

On September 15, 2003, four new content descriptors²⁹¹ developed by the ESRB took effect, and these help, to some extent, to clarify the meaning of some of the words used in these definitions.²⁹² For instance, the “M” rating uses the term “intense violence.” The ESRB now has a new descriptor for this term, defining “intense violence” as “graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death.”²⁹³ The other new descriptors distinguish intense violence from cartoon violence,²⁹⁴ fantasy violence²⁹⁵ and sexual violence.²⁹⁶ The “M” and “AO” definitions mentioned above, however, “are unaffected” by these changes and additions in the descriptors.²⁹⁷ Also unchanged,

288. See *supra* notes 200-06 and 207-12 (describing terms of Delaware and Minnesota bills).

289. *ESRB Guide*.

290. *Id.*

291. Content descriptors are “short, standardized phrases printed on the back of game boxes that alert consumers to content elements that may be of interest or concern.” Matthew Kagan, *Entertainment Software Rating Board Adds Four Content Descriptors to Rating System and Unveils New Game Box Labels*, June 26, 2003, at <http://www.esrb.org/newslinks.asp?id=15&ann=4>.

292. Mike Snider, *Ratings to be Clearer on Video-Game Boxes*, USA TODAY, June 27, 2003, at 9E (discussing vagueness of ratings).

293. Kagan, *supra* note 291 (describing newly developed ESRB content descriptors designed to provide parents and consumers more detail about games).

294. See *id.* The new ESRB descriptor for “cartoon violence” is defined as “violent actions involving cartoon-like characters. May include violence where a character is unharmed after the action has been inflicted.” *Id.*

295. See *id.* The new ESRB descriptor for “fantasy violence” is defined as “violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life.” *Id.*

296. See *id.* The new ESRB descriptor of “sexual violence” is defined as “depictions of rape or other sexual acts.” *Id.*

297. *Id.* (noting design of rating symbol would change).

is the old descriptor for the root word “violence,” which is defined simply as “[s]cenes involving aggressive conflict.”²⁹⁸

The precision added by the new content descriptors clearly will help decrease the chances of the ESRB-based definitions being declared void for vagueness. The irony, of course, would be extreme if the new descriptors made the bills in Delaware and Minnesota immune from a vagueness challenge. The ESRB, in voluntarily improving its own ratings system to help parents make better choices, actually would have tied its own legal noose.

On the other hand, there is still some room for a vagueness challenge of the pivotal root word, “violence” — “[s]cenes involving aggressive conflict.”²⁹⁹ The United States Supreme Court once proclaimed, “one man’s vulgarity is another’s lyric.”³⁰⁰ Clearly, the same logic holds true today in defining words like “aggressive” and “conflict”; one person’s aggression is another person’s zealotry. The bottom line here is that the definitions of “M” and “AO” supplied by the ESRB, while helpful for providing parental guidance, may not provide sufficient legal guidance. Most likely, then, these definitions would be declared unconstitutionally vague, and would thereby render the Delaware and Minnesota legislation unconstitutional.

As Parts I and II of this article have demonstrated, despite the odds of anti-access video game legislation being declared unconstitutional, the supply of future legislative efforts is not likely to diminish. Future legislative efforts are sustained by a number of rhetorical strategies employed by its advocates. These important strategies and techniques are analyzed in Part III of this article.

III. THE RHETORIC OF RESTRICTION: THEMES AND STRATEGIES OF ANTI-ACCESS LEGISLATION PROPONENTS

Why do the proponents of legislation limiting minors’ access to violent video games continue to draft bills, despite the transparent fact that such bills most likely will be declared unconstitutional? One obvious answer is that it is a politically popular position to attack the media — media bashing and the media blame-game are nothing new³⁰¹ — and, concomitantly, to advocate the reduction of

298. *ESRB Guide*.

299. *Id.* (listing content descriptors).

300. *Cohen v. California*, 403 U.S. 15, 25 (1971) (referring to slogan on defendant’s jacket).

301. As Professor Bob Thompson of Syracuse University says about today’s attacks on violent media content:

violence in society.³⁰² No politician, after all, is going to come out and declare, "Yes, I support violence in video games. I support a culture of violence." Taking such a position surely would be political suicide.

This part of the article, which analyzes a number of sources — ranging from newspaper articles to press releases to the text of testimony before legislative bodies — identifies five major themes and strategies commonly employed by the advocates of such legislation to win popular — and perhaps, judicial — support for their bills. These measures arguably amount to the sophistry — plausible yet fallacious logic that is used to deceive and obfuscate — that is exposed below through critique and criticism. At worst, the arguments of the pro-legislation lobby are at the height of dissembling.

A. We're Not Anti-First Amendment; We're Pro-Parent

One of the most important and popular strategies of legislators who want to curtail minors' access to violent video games is to suggest that the legislation is decidedly pro-parent, and that it is all about helping parents be better parents, not about infringing on anyone's First Amendment rights. Disseminating this position to the public in newspapers supposedly wins public — read, parental — support and re-election.³⁰³

This is the same old story going back to any form of popular media in history. It goes all the way back to when people thought Coney Island was going to put kids on the road to perdition. It is the comic-books scare in the 1950s, which almost destroyed the industry. Whatever is the culture of choice tends to upset parents no end.

Id. C. W. Nevius, *Parents Fear Perils of Media, Poll Shows; New S.F. Group Puts Ratings Guide Online*, S.F. CHRON., May 22, 2003, at A1.

302. It is more than a little ironic, of course, that this wave of video game legislation, which is based on fears of violence, is occurring despite the fact that "violent crime and property crime fell last year to their lowest levels since the government began collecting statistics 30 years ago." Richard Willing, *Crime Rate Hits 30-Year Low*, USA TODAY, Aug. 25, 2003, at 1A. Enhancing the irony is the fact that juvenile crime itself is also down in states across the country. *See, e.g.*, Ian Ith, *Arrests Show Juvenile Crime at 20-Year Low*, SEATTLE TIMES, Sept. 17, 2002, at B1 (reporting decrease juvenile crime rate in State of Washington — first state to enact video game access legislation); Babita Persaud, *Bush Budget Worries Youth Agencies*, ST. PETERSBURG TIMES (Fla.), Feb. 26, 2003, at 4B (describing "lower juvenile crime rate" in Florida); Craig Whitlock, *Ehrlich Offers Reforms in Juvenile Justice; Republican Promises More Money and Criticizes Md. Agency*, TOWNSEND'S RECORD, WASH. POST, Oct. 10, 2002, at B05 (reporting "juvenile crime rates have declined" in Maryland).

303. Interestingly, support of such video game legislation does not always lead to re-election. Consider the case of Jeff Wagener, the St. Louis County Council member who in October 2000 proposed the anti-access video game legislation described earlier in this article. He was defeated less than three months after proposing that measure when he ran for another term. *See* Phil Sutin, *Council May Shift its Meetings to Nighttime; GOP now controls of St. Louis County body*, ST. LOUIS POST-DIS-

Consider, for instance, the recent comments of Representative Joe Baca, the primary sponsor of the "Protect Children from Video Game Sex and Violence Act of 2003":³⁰⁴

We, as parents, have to take responsibility for our children. But stores also have a responsibility. When kids can walk into their neighborhood stores and buy games with graphic[ally] violent and sexual content, parents are cut out of the decision-making process. If local, state or federal governments have to help put parents back into the equation, then so be it.³⁰⁵

Baca uses the word "parents" three times in a matter of only four short sentences. Furthermore, he forgets to mention that part of "the equation," as he calls it, which involves the First Amendment rights of those parents' children, also involves the rights of the creators of video games.³⁰⁶

Baca, of course, is not the only proponent of access-limitation legislation to play the pro-parent card in sponsoring legislation. St. Louis County Councilman Jeff Wagener followed the same path when proposing a law that ultimately was declared unconstitutional by the Eighth Circuit.³⁰⁷ As he told members of the Council's Justice Health and Welfare Committee, his goal is "not to ban video or arcade games, but to give parents control."³⁰⁸

When advocates of legislation raise the First Amendment, they never say that the First Amendment is not an important part of life in the United States.³⁰⁹ They are too clever to fall into that trap. Instead, advocates of such legislation suggest that the First Amendment simply is not relevant, because it just does not apply to video games in the first place. For instance, Representative Mary Lou Dickerson, author of the Washington law that was enjoined by a

PATCH, Nov. 9, 2000, at C1 (describing how Republican John Campisi defeated Wagener).

304. See *supra* note 8 and accompanying text.

305. Karen MacPherson, *Bill Would Shield Kids From Graphic E-Games*, PITT. POST-GAZETTE, June 23, 2003, at A-1.

306. *Id.*

307. See *supra* notes 46-132 and accompanying text.

308. Sutin, *supra* note 50, at D4.

309. Indeed, Mary Lou Dickerson, the sponsor of the statewide legislation in Washington, even referred to it reverentially as "our precious First Amendment." Queary, *supra* note 26 (reporting comments when law enacted). Jeff Wagener, the sponsor and author of the St. Louis County legislation, told a reporter that "I know the First Amendment is very powerful, and we shouldn't place restrictions on it lightly." Donna Walter, *Video Game Ordinance Considered Unconstitutional*, ST. LOUIS DAILY RECORD, June 5, 2003.

federal court in July 2003,³¹⁰ told broadcast journalist Gwen Ifill during *The NewsHour with Jim Lehrer* that "I don't believe that when we're talking about ultra-violent video games where players get points for decapitating people or beating people to death, I don't believe that's covered by the First Amendment."³¹¹ Likewise, Michelle Bachmann, a Minnesota state senator and supporter of anti-access legislation in that state, told her fellow senators in May 2003, "We're talking hard core, triple-x material. You want to tell me that people in this body would call this free speech?"³¹²

The pro-parent, pro-legislation position is, of course, easy to take. After all, no politician wants to be dubbed "anti-parent." Yet, the irony is that parents who are concerned about their children's well-being do not need the government to step in and act on their behalf, or to tell them what their kids may not purchase without their permission. As a parent from St. Louis County told the Council during a public-forum segment on its anti-access legislation, "it's not up to the government to say whether or not I'm a bad parent."³¹³

Parents already have ratings for video games supplied by the ESRB, which are available to them without the need for government legislation. All they need to do is visit the ESRB website at <http://www.esrb.org/> to find ratings for games like *Doom*³¹⁴ or *Grand Theft Auto: Vice City*, a top seller and favorite whipping boy³¹⁵

310. See *supra* notes 138-78 and accompanying text.

311. *The NewsHour with Jim Lehrer: Violent Video Games* (PBS television broadcast, July 7, 2003), available at http://www.pbs.org/newshour/bb/entertainment/july-dec03/video_07-07.html [hereinafter *NewsHour*].

312. Patrick Howe, *Senate Hopes to Press 'Reset' on Violent Game Sales to Children*, ASSOC. PRESS STATE & LOCAL WIRE, May 8, 2003 (describing debate surrounding Minnesota vote, which made it illegal for children under seventeen to rent or buy violent video games).

313. Sutin, *supra* note 48, at C1 (quoting Chris Leukert, parent from south St. Louis County).

314. See ESRB Ratings, at http://www.esrb.org/search_results.asp?key=doom&x=44&y=8&type=game (last visited June 2, 2004).

315. For instance, in his March 2003 newsletter to constituents, Washington state Representative, Jerome Delvin, wrote that House Bill 1009, which later would become law and only to be enjoined by a federal court as described in Part I, Section B of this article, "is intended to make it harder for kids to get their hands on games such as 'Grand Theft Auto: Vice City' (which lets players kill police officers, steal cars, vandalize stores, deal drugs, rape prostitutes and so on)." *Make Violent Video Games Harder to Get*, A REPORT FROM THE 2003 LEGISLATIVE SESSION (Rep. Jerome Delvin, 8th Legislative District), Mar. 2003, at 3 (on file with authors). A copy of this newsletter can be found online at the website of Representative Jerome Delvin. See http://www.leg.wa.gov/house/members/newsltr/delvin03_1.pdf (last visited June 2, 2004).

of the anti-access legislation proponents.³¹⁶ *Grand Theft Auto: Vice City* is rated “M” because of, as the ESRB website tells parents, “Blood and Gore, Strong Language, Strong Sexual Content, [and] Violence.”³¹⁷ A number of other websites run by non-governmental agencies also exist to help parents make wise choices about their children’s media consumption.³¹⁸

This type of information is sufficient to place the government out of the video game equation and to leave parents in charge. As Stephanie Greist, communications director for the Free Expression Policy Project, told a reporter for *The New York Times* in June 2003, “[p]arents are the best judges of their children and what they can handle.”³¹⁹

B. Kids Are Naïve and Weak; They Need Our Help and Eminent Wisdom

If you listen to the advocates of anti-access video game legislation, you would believe that children in the United States are incredibly weak, susceptible to any media influence, and engage in whatever behavior they see in a video game. Consider the following:

- United States Rep. Joe Baca believes that “kids are being brainwashed” by video games.³²⁰
- Sandy Pappas, a state senator from Minnesota who is sponsoring legislation in that state, believes that violent video games are “very detrimental to the psychological well-being of our youth.”³²¹

316. See MacPherson, *supra* note 305, at A1 (“U.S. Rep[resentative] Joe Baca is no fan of ‘Grand Theft Auto: Vice City,’ the best-selling video game in America last year”).

317. See ESRB Game Ratings, at http://www.esrb.org/search_results.asp?key=grand+Theft+Auto+Vice+City&x=33&y=2&type=game (last visited June 2, 2004) (rating *Grand Theft Auto: Vice City*).

318. See, e.g., Common Sense Media, at <http://www.common sense media.org> (last visited June 2, 2004) (featuring video game rating media guide).

319. Katie Hafner, *On Video Games, The Jury Is Out And Confused*, N.Y. TIMES, June 5, 2003, at G7 (exploring allegations of video games inducing violent behavior).

320. Press Release, Baca to Federal Trade Commission: “What are you doing to protect our kids?,” Apr. 10, 2003 (applauding Congressman Baca’s questioning of Federal Trade Commission efforts to curtail violent video game sales to minors), at <http://www.house.gov/baca/108th/pr030410.htm> [hereinafter *Baca FTC*].

321. Howe, *supra* note 312.

- Video game makers, in the words of Jeff Wagener, the sponsor of the St. Louis County ordinance, “prey on children.”³²²

The use of words like “brainwashed” and “prey” is tantamount to what the United States Supreme Court calls “rhetorical hyperbole.”³²³ These are words used in a “loose, figurative sense” that constitute nothing more than “lusty and imaginative expression.”³²⁴

While the video game industry exists to make a profit, like thousands of other business that sell products, it is not preying on children. In fact, the industry sponsors the ratings for video games that parents and children may use to decide what is or is not suitable content. The ESRB states on its website that it:

is a self-regulatory body . . . established in 1994 by the Entertainment Software Association (ESA), formerly the Interactive Digital Software Association (IDSA). ESRB independently applies and enforces ratings, advertising guidelines, and online privacy principles adopted by . . . the industry. To date, the ESRB has rated more than 9,000 titles submitted by 350 publishers.³²⁵

Concerned parents are free to use the ESRB’s Web site as previously noted in Section A.³²⁶ The ESRB notes on its home page that its rating system “helps parents and other consumers choose the games that are right for their families.”³²⁷ The video game *Grand Theft Auto: Vice City*, which legislators so often complain about, is rated “M” for Mature, meaning that it is suitable only for people seventeen years of age and older.³²⁸ This clearly is not a case of the video game industry preying on children. It is, in contrast, a case of the video game industry voluntarily coming forward and telling parents that the game is not intended for minors.

322. Jeff Wagener, *Letters to the Editor: Enforce Video Game Ordinance*, ST. LOUIS POST-DISPATCH, June 22, 2002, at 36 (supporting violent video game ordinance).

323. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 17 (1990) (quoting *Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6, 13-14 (1970)).

324. *Id.* (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974)).

325. About ESRB, at <http://www.esrb.org/about.asp> (last visited June 2, 2004) (explaining purpose of ESRB).

326. See *supra* note 201 and accompanying text.

327. ESRB website, at <http://www.esrb.org> (last visited June 2, 2004) (listing content and purpose on homepage).

328. See *ESRB Guide* (defining game ratings).

What might be called the hyperbole-of-harm strategy described in this section is closely linked to another strategic device of legislative advocates. That other tool is described below in Section C.

C. The Games Allow Children to Kill People, Even Though They Aren't Really People . . . And Even Though They Aren't Really Killing

"Some games even allow children to watch naked strippers and watch acts of sodomy and oppression," said Representative Joe Baca in an April 2003 press release, calling for curtailment of the sale and rental to minors of sexual and violent video games.³²⁹ Of course, his statement is not really correct at all. Video games do not actually allow kids to watch naked strippers in person or to see real acts of sodomy or violence. Instead, they allow kids to look at and to interact with either technologically generated fictitious images — cartoon or pixilated — or video images placed on a computer game. Moreover, these games are specifically rated as intended for mature audiences only, such as the game *BMX XXX*, which carries the "M" rating,³³⁰ in part, because it does feature topless nudity in some versions.³³¹

Merriam-Webster's Collegiate Dictionary defines the word "anthropomorphic" to mean, "ascribing human characteristics to nonhuman things."³³² This process was precisely illustrated when Representative Mary Lou Dickerson, author of the now-enjoined Washington state law, said, as she did on *The NewsHour with Jim Lehrer* in July 2003, that the games allow kids to engage in "[d]ifferent variations on beating women to death. Players get points for having sex with a prostitute. Now they're getting out of

329. *Baca FTC*, *supra* note 320, at <http://www.house.gov/baca/108th/pr030410.htm>.

330. See ESRB Game Rating, at http://www.esrb.org/search_results.asp?key=BMX+XXX&x=25&y=13&type=game (last visited June 2, 2004) (rating *BMX XXX* as "M"). The "M" rating, as established by the ESRB, means that the content "may be suitable for persons ages 17 and older. May contain mature sexual themes or more intense violence or language." *ESRB Guide* (listing video game ratings).

331. See Press Release: AKA ACCLAIM RELEASES 'BMX XXX' FOR NINTENDO GAMECUBE, at <http://www.acclaim.com/company/pressReleases/product/BMXXXXGameCubeShips.html> (last visited June 2, 2004) (describing *BMX XXX* as being "designed specifically for today's predominantly mature gaming audience"). "The version for the PlayStation2 computer entertainment system has been edited to eliminate the topless nudity, while versions for Xbox and Nintendo GameCube do contain topless nudity." *Id.*

332. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 93 (11th ed. 2003).

the car, he's going to take his money back, and then beat the prostitute to death."³³³

There are, of course, no real prostitutes. No one actually beats women to death. Children do not get to beat up prostitutes. Instead, they engage in a fictitious role-playing activity. Dickerson is naïve to think that most kids cannot tell fact from fiction. Of the many thousands of kids (and adults) who have played the game *Grand Theft Auto: Vice City*, the video game Dickerson implicitly referred to in her comments,³³⁴ how many have actually beaten up a real prostitute or killed a police officer or any other person for that matter?³³⁵ Dickerson wisely avoids this issue.

Seventeen-year-old Michael Capece, who has been playing video games his whole life, perhaps put it best when he said to a reporter from the *Buffalo News* that "just because you see something in a game doesn't mean you're going to go out and do it. I'm not going to act them out."³³⁶ As sixteen-year-old Cory Clontz, who has played video games since he was six and spends a couple of hours each night playing them, told the same reporter, *Grand Theft Auto: Vice City* is "hot because people lust for violence in games. They

333. *NewsHour*, *supra* note 311 (reporting debate surrounding video game laws).

334. In *Grand Theft Auto: Vice City*, "a player can have sex with a prostitute and then beat her to death with a crowbar." Hannah Bergman, *County Still Will Push To Curb Violent Video Games*, ST. LOUIS POST-DISPATCH, June 24, 2003, at B1 (outlining legal battle between St. Louis County officials and gaming industry with respect to marketing violent video games to children).

335. Out of the hundreds of thousands of people who have played *Grand Theft Auto: Vice City*, the authors of this article could find only two reported cases in which it is alleged that playing a version of the game influenced children to commit murder. In a civil lawsuit now pending in Ohio, it is alleged that the killing of a 17-year-old girl was inspired by an earlier version of this video game, called *Grand Theft Auto III*. See Stephen Hudak, *Lawyer's Motive in Teen Murder Trial Debated*, PLAIN DEALER (CLEVELAND), June 7, 2003, at B3 (detailing murder of JoLynn Mishne). The defendant in the related criminal case, Dustin Lynch, pleaded guilty in December 2003 to one count of aggravated murder by prior calculation and design, with prosecutors apparently ignoring the role of the video game. Rena A. Koontz, *Teen Gets Life for Killing Medina Girl*, PLAIN DEALER (CLEVELAND), Dec. 23, 2003, at B1. In another case, a Michigan man was killed by minors who were allegedly inspired by playing *Grand Theft Auto III*. See Paul M. Weyrich, *Most Dangerous Games: Video Games That Inspire Serious Crimes*, FREE CONGRESS FOUNDATION: NOTABLE NEWS NOW, Feb. 5, 2003 (praising efforts of Representative Joe Baca and attorney Jack Thompson for pursuing legislation regulating purchase of violent video games), available at <http://www.freecongress.org/commentaries/2003/030205PW.asp>.

336. Anthony Violanti, *You Call This Fun?: That's What Parents May be Wondering as a New Generation of Gaming Glorifies Life-Like Brutality, Vice and Violence*, BUFFALO NEWS (N.Y.), Jan. 26, 2003, at E1.

can't do violence in real life, so they do it in games. That way, they don't get in trouble."³³⁷

Finally, the fact that the violent images in question are not real is an important point that merits attention. In *Ashcroft v. Free Speech Coalition*,³³⁸ the United States Supreme Court protected computer-generated and other fictitious images that were so life-like that they appeared to be of real children engaged in sexually explicit conduct. In so holding, Justice Anthony Kennedy wrote for the Court that the federal statute at issue, the Child Pornography Prevention Act of 1996, "proscribes the visual depiction of an idea — that of teenagers engaging in sexual activity — that is a fact of modern society and has been a theme in art and literature throughout the ages."³³⁹

Similar reasoning, of course, applies to regulating video games that contain fictitious images. Violence, like teens engaged in sexual activity, is indeed a fact of modern society and has, as Judge Posner observed in *Kendrick*, been a theme in art and literature throughout the ages.³⁴⁰

Moreover, the Court in *Free Speech Coalition* also stressed the extremely speculative nature of the harm allegedly caused by the fictitious images, stating that "[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."³⁴¹ The same logic applies with the violent imagery in video games. The harm in this case — kids acting out with violent and aggressive behavior against others — does not necessarily flow from the speech. Such a harm similarly depends on some unquantified potential for subsequent criminal acts. If the connection between the speech and the harm in *Free Speech Coalition* is, as Justice Kennedy described it, "a remote connection,"³⁴² surely the connection between those who play a video game depicting the killing of prostitutes and those who actually then go out and kill prostitutes is equally as remote, if not more so.

337. *Id.* (describing appeal of violent video games to sixteen-year-old Cory Clontz).

338. 535 U.S. 234 (2002).

339. *Id.* at 246 (reflecting on literary, artistic, political, and scientific value of speech prohibited by Child Pornography Prevention Act).

340. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (noting games depicting violent images have not incited youths to commit violent acts).

341. *Free Speech Coalition*, 535 U.S. at 250 (finding only contingent, indirect causal link between virtual child pornography and actual child abuse).

342. *Id.* at 253 (describing link between "speech that might encourage thoughts or impulses and any resulting child abuse").

D. The Best Evidence is Anecdotal . . . or Maybe It's Social Scientific

When legislation is proposed that restricts minors' access to video games, one can rest assured that one word — Columbine³⁴³ — undoubtedly will appear somewhere in close proximity to the supporting rhetoric, along with, more recently, another name — Malvo. That is because advocates of legislation love to use anecdotal evidence — such as the shootings by Eric Harris and Dylan Klebold at Columbine High School near Littleton, Colorado, in April 1999, and the sniper shootings near Washington, D.C., in fall 2002 allegedly committed by Lee Boyd Malvo³⁴⁴ — about real-life violence that supposedly was caused by fictitious video-game violence.

Consider the testimony of Jack Thompson, a Florida attorney and outspoken critic of video games,³⁴⁵ before the state of Washington's Senate Children & Family Services & Corrections Committee. His testimony was in support of the law that was struck down by Judge Lasnik:

[W]e learned within three days of Columbine that for months Klebold and Harris trained for murder by playing *Doom*. They used a software patch by Ids software of Dallas[,] Texas — the creators of *Doom* — that let them morph the yearbook faces of their classmates from their Columbine year book onto the bodies of the virtual humans they practiced killing. They were sold other software patches — by the same company coming out with *Doom 3* which will eclipse the mayhem of that game — to alter the hallways of the virtual killing field in which they stalked their prey and the colors and twists and turns of the hallways as they stalked their prey. They were pro-

343. See generally Tom Kenworthy, *Up to 25 Die in Colorado School Shooting*, WASH. POST, Apr. 21, 1999, at A1 (describing killings at Columbine High School as "a shooting rampage on a scale unprecedented in an American school").

344. Malvo and a companion were "accused in all [ten] fatal sniper shootings in the Washington area" in fall 2002. Tom Jackman, *Disclosures May Help Malvo's Defense*, WASH. POST, July 24, 2003, at B1. It has been reported that Malvo played the video game *Halo* and that his alleged accomplice, John Allen Muhammad, "would coach Malvo on how to shoot in the sniper mode" of *Halo* and that Malvo "was really into the game and would often get angry while playing it." *Id.* at B7 (quoting Commonwealth Attorney Robert F. Horon, Jr.). Malvo was convicted of capital murder in December 2003. See Andrea F. Siegel, *Jury Convicts Malvo in Sniper Shootings*, BALT. SUN, Dec. 19, 2003, at 1A.

345. See Hudak, *supra* note 335, at B3 (describing Thompson as "a lawyer known for crusading against violence in video games").

vided by a leader in the industry with a virtual killing field in which they trained to kill their eventual victims. And they were so enamored of *Doom* that *Time* Magazine said in their videotape suicide note they named a shotgun after one of the characters in *Doom*.³⁴⁶

Just a few paragraphs later, the inevitable, almost obligatory, reference to Malvo appeared in Thompson's prepared testimony:

On October 10 of last year, I appeared live on NBC's *Today* show and I told Matt Lauer, with the Beltway Snipers still unknown and at large, that the shooter would "likely be a teenaged boy who trained on a video game switched to sniper mode." Two weeks later Muhammad and Malvo were caught. Two months after that *Dateline NBC* on December 14 reported: "Muhammad, satisfied with Malvo's ability to snipe at a distance developed on the rifle range, still found Malvo unwilling to kill, so he, Muhammad, had Malvo play a shooter video game, switched to sniper mode, which broke down the teens [sic] inhibition to kill."³⁴⁷

Thompson's testimony is littered with other specific anecdotes, in which video games allegedly were, in Thompson's own words, "a final link in a twisted chain of events pushing a kid at risk over the edge."³⁴⁸ Thompson is not the only legislative advocate who references Columbine or Malvo. For instance, Representative Dickerson, in her appearance on *The NewsHour with Jim Lehrer* in July 2003, stated:

We've been seeing a whole rash of shootings throughout this country and in Europe that relate back to kids who obsessively play violent video games. The kids involved as shooters in Columbine were obsessively playing violent video games. We know after the beltway sniper incident where the 17-year-old was a fairly good shot, but Mr. Mohammed, the police tell us, got him to practice on an ul-

346. Jack Thompson, Testimony on House Bill 1003 before the Senate Children & Family Services & Corrections Committee (Apr. 2, 2003) (providing Thompson's testimony on proposed law banning sales of violent video games to children under seventeen), available at <http://hdc.leg.wa.gov/members/dickerson/thompsonstestimony.asp>.

347. *Id.*

348. *Id.*

tra-violent video game in sniper mode to break down his hesitancy to kill.³⁴⁹

Jeff Wagener, the sponsor of the now-enjoined St. Louis County ordinance, also referenced Columbine and other school shootings at a news conference when he first introduced the measure. He stated that “[e]xposure to such violence has been linked to anti-social and violent behavior, such as the school shootings in Columbine, Jonesboro and Paducah.”³⁵⁰ In a newspaper opinion column lamenting the appellate court’s decision, Wagener reiterated this use of anecdotal evidence, writing that “[t]he perpetrators of the school shootings in Littleton, Colo., Jonesboro, Ark., and Paducah, Ky., were avid fans of these games and used them to perfect their shooting technique.”³⁵¹

Appeals to anecdotal evidence, in large part, are flawed because such high-profile events like Columbine are incredibly rare. As James Forman, Jr., a fellow at the New America Foundation,³⁵² observed in a guest editorial in *The Washington Post*, “a child now has less than a one-in-two-million chance of being killed in school. Today a student is more likely to be killed by lightning than in a school homicide.”³⁵³ Thus, while anecdotal evidence is not completely valueless,³⁵⁴ and certainly has vast visceral appeal, it must be remembered that such rare incidents, which involve a multitude of contributory factors other than violent video games, should not be used to support broad-based legislation.

Because the anti-access legislation advocates apparently realize that they cannot rest their case on anecdotes alone, they also appeal

349. *NewsHour*, *supra* note 311 (reporting debate surrounding laws regulating sale of violent video games).

350. Sutin, *supra* note 48, at C3 (outlining Wagener’s motives for proposing legislation).

351. Wagener, *supra* note 125, at B7 (citing studies by American Medical Association suggesting children exposed to violent video games imitate such behavior).

352. The New America Foundation describes itself as:
an independent, non-partisan, non-profit public policy institute that was conceived through the collaborative work of a diverse and intergenerational group of public intellectuals, civic leaders, and business executives. New America’s Board of Directors is chaired by James Fallows, and Ted Halstead is the organization’s founding President and CEO. Based in our nation’s capital, the Foundation opened its doors in January 1999.
New America Foundation Mission, at <http://www.newamerica.net/index.cfm?pg=overview> (last visited June 2, 2004) (stating mission and description of New America Foundation).

353. James Forman, Jr., *Overkill on Schools*, WASH. POST, Apr. 23, 2001, at A15 (arguing against adoption of zero tolerance policies at schools).

354. See SINGLETARY, *supra* note 113, at 43 (describing anecdotal evidence as “prescience” does not include “the rigor of science”).

to social science research on media effects. The classic question asked in the media effects tradition of communication science,³⁵⁵ as originally posed by Harold Lasswell fifty years ago, is "Who Says What In Which Channel To Whom With What Effect?"³⁵⁶ In the case of violent video games, the relevant issue is: "What are the effects of playing these games on children?" Legislative advocates would like to have the public and courts believe that these games cause children to become violent predators.

Although the courts in *Kendrick*, *IDSa*, and *Maleng* have each rejected social science evidence for failing to support the video game laws at issue in those cases, appeals to science are still commonplace among legislative proponents. In fact, social science research is now finding its way directly into the legislative record. For instance, Representative Joe Baca's federal bill for the "Protect Children from Video Game Sex and Violence Act of 2003" provides, in relevant part:

On July 26, 2000, six of the Nation's most respected public health groups, including the American Medical Association, the American Academy of Pediatrics, the American Academy of Family Physicians, and the American Academy of Child and Adolescent Psychiatry, found that viewing entertainment violence can lead to increases in aggressive attitudes, behaviors, and values, particularly in children.³⁵⁷

St. Louis County Councilman Jeff Wagener also appeals to the use of social science to argue that the legislation he sponsored is necessary. As he wrote in the *St. Louis Post-Dispatch*, "[s]tudies by the American Medical Association suggest that exposure to violent video games cause children to imitate the violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded."³⁵⁸ Thus, the official preamble to the St. Louis County ordinance included, not surprisingly, similar language:

355. Communication scholars, Charles Berger and the late Steven Chaffee wrote, "communication science seeks to understand the production, processing, and effects of symbol and signal systems by developing testable theories, containing lawful generalizations, that explain phenomena associated with production, processing, and effects." CHARLES R. BERGER & STEVEN H. CHAFFEE, *HANDBOOK OF COMMUNICATION SCIENCE* 17 (1987).

356. Harold D. Lasswell, *The Structure and Function of Communication in Society*, in *READER IN PUBLIC OPINION AND COMMUNICATION* 178 (2d ed. 1966) (suggesting answer to question is "a convenient way to describe an act of communication").

357. H.R. 669, 108th Cong. (2003).

358. Wagener, *supra* note 125, at B7 (justifying use of social science).

WHEREAS, numerous medical studies have cited a link between prolonged playing of violent video games and violent, antisocial and otherwise harmful behavioral patterns, and the American Medical Association suggests that exposure to violence, such as in these video games, causes children to imitate violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded.³⁵⁹

In the state of Washington, the official record of House Bill 1009 provides, in pertinent part, that “there has been an increase in studies showing a *correlation* between exposure to violent video and computer games and various forms of hostile and antisocial behavior.”³⁶⁰ The key weakness in this statement is the word “correlation,” which fails to carry the same meaning or match the importance of the word causation.³⁶¹

Likewise, the vague terms “hostile” and “antisocial behavior” can be interpreted so broadly as to mean “being impolite or mean.” There is a major difference between research showing a correlation between playing violent video games and being impolite and research showing a direct cause-and-effect relationship between playing violent video games and killing real-life police officers or prostitutes.

Police and prostitutes seem to form a very unlikely pairing of protected classes with which legislators are most concerned. The Washington law applied only to games in which “the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.”³⁶² The game *Grand Theft Auto: Vice City*, one that Representative Joe Baca so disdains,³⁶³ is most often criticized because “a player gets points for hiring a prostitute, hav-

359. *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1129-30 (E.D. Mo. 2002) (describing link between video games and violent tendencies in youth), *rev’d*, 329 F.3d 954 (8th Cir. 2003).

360. H.R. 1009, 58th Leg., Reg. Sess. (Wash. 2003) (emphasis added).

361. For a further discussion on “correlation,” see *supra* notes 112-14 and accompanying text.

362. H.R. 1009, 58th Leg., Reg. Sess. (Wash. 2003). A complete legislative history of this bill can be found on the Washington State Legislature website at <http://www.leg.wa.gov/wsladm/billinfo/dspBillSummary.cfm?billnumber=1009> (last visited June 2, 2004).

363. See Meltz, *supra* note 110, at H1 (writing “Congressman Joe Baca (D-Calif.) didn’t like what he saw when constituents complained about a game called *Grand Theft Auto: Vice City*”).

ing sex with her, beating her to death, and taking back his money.”³⁶⁴

Ultimately, social science will never provide legally persuasive answers on video game regulation, nor will it ever resolve debates about the effects of playing violent video games. As Margaret Talbot,³⁶⁵ a fellow at the New America Foundation, wrote in *The New York Times Magazine* about what she aptly called “the eternal debate about whether violent video games cause children who play them to become more aggressive,”:

The truth is that while partisans on both sides are always declaring the matter resolved by social science, it hasn’t been. There are studies that show short-term increases in aggressive thoughts and behavior after playing violent video games —and studies that show decreases. In research that does find an association between aggression and the consumption of certain kinds of media, it can be hard or impossible to sort out the effects of television watching or video-game playing from other factors — living in dangerous neighborhoods or with neglectful families, for example. And the measures of aggression sometimes used in lab studies with young children — bopping those inflatable clown dolls that bounce back up (who are, after all, made to be bopped) or blasting white noise — are often unhelpful. Playing a lot of violent video games may contribute to violent behavior — it wouldn’t be all that surprising if it did — and then again, it may not: rates of adolescent violence have fallen during the same period that violent video games have become more widespread and more graphic.³⁶⁶

In addition to putting forth both anecdotal evidence and social science studies, the pro-legislation advocates have at least one more strategy.

364. *Id.* (describing criticized features of *Grand Theft Auto: Vice City*).

365. Talbot currently serves as a contributing writer to *The New York Times Magazine*, having published several cover stories. She has also worked as an editor for both *Lingua Franca* and *The New Republic*, and has written for *The New Yorker*, *Salon*, and *The Atlantic Monthly*. See *About Us: Margaret Talbot, Senior Fellow*, at <http://www.newamerica.net/index.cfm?pg=bio&contactID=21> (last visited June 2, 2004) (providing Talbot’s biography).

366. Margaret Talbot, *My Son, the Cyborg*, N.Y. TIMES MAG., June 15, 2003, at 11 (describing debate concerning effects of violent video games on adolescent behavior).

E. There Are Only Two Interests at Stake – Parental and Corporate

“This is about parents’ rights The right of parents to control their children’s games outweighs the right of retailers to make a fast buck by selling adult-rated games to children.”³⁶⁷ That is how Representative Mary Lou Dickerson of Washington framed the issue surrounding the alleged need for access-limitation legislation.³⁶⁸

Advocates of anti-access legislation identify only two interests at stake: those of the corporations that create and produce video games, and those of the parents whose children play them. The corporate interest, according to legislative advocates, is pure greed, not freedom of expression. As Daphne White, executive director of the Lion & Lamb Project,³⁶⁹ explained to a reporter in June 2003, shortly after the Eighth Circuit struck down St. Louis County’s ordinance, “[t]he industry is clearly marketing to kids and then hiding behind the First Amendment They spend hundreds of thousands of dollars fighting these lawsuits. Why? Because they want our children to buy these games.”³⁷⁰ Not only does White expose the corporate greed theme, she also raises the parental interest theme by employing the phrase “*our children*.” Greg Quinn, the head of the St. Louis County Council, which adopted the ordinance struck down by the Eighth Circuit, framed the appellate court’s decision in terms of a blow to the parental interest. He told a newspaper reporter, “In our society, parents are the people entrusted with the upbringing of their children, and we viewed this as assisting them in doing this with regard to video games.”³⁷¹

367. Press Release, House Votes to Ban Sales of Cop-Killing Video Games to Minors, at <http://hdc.leg.wa.gov/members/dickerson/gameviolencefp.asp> (last visited June 2, 2004) (quoting Representative Dickerson’s on passage of anti-access legislation in Washington).

368. The term “framing” is used in this article to refer to rhetorical strategies, including choice of words and what facts to include and exclude, which are used in describing an event and that make salient some issues surrounding the event while suppressing others, which, in turn, impacts how we think about, understand, and process the event in question. See generally JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD 38-48, 77-78 (Oxford Univ. Press 1997) (discussing concept of framing within field of journalism).

369. See *supra* note 85 (describing mission of Lion & Lamb Project).

370. Bergman, *supra* note 334, at B3 (quoting Daphne White) (describing what some opponents to violent entertainment for children believe to be ineffective self regulation).

371. Peter Shinkle & Hannah Bergman, *Violent Video Games Gain Victory in Court*, ST. LOUIS POST-DISPATCH, June 4, 2003, at A4 (quoting Greg Quinn) (reporting reaction to Eighth Circuit’s ruling striking down county ordinance).

Not surprisingly, what is never mentioned by the anti-access advocates is the third stakeholder involved in the equation — a stakeholder other than corporations and parents. That stakeholder is the child and, in particular, the child who desires to play video games. Children have a First Amendment right to receive speech.³⁷² This right has been mentioned by both the Circuit Courts in *American Amusement Machine Association*³⁷³ and *Interactive Digital Software Association*.³⁷⁴

In summary, there are multiple rhetorical strategies and methods employed by the anti-access video game legislative advocates. This article has identified five techniques that seem to be consistently employed. It is important to both recognize and critique them, because they provide the spin upon which legislation's curtailing the First Amendment right of free expression is premised.

CONCLUSION

"It's 2003, get over it."³⁷⁵

Such was the succinct and astute assessment of seventeen-year-old Miranda Boncore from Buffalo, New York. She has played video games for eleven years, calls *Grand Theft Auto: Vice City* "cool," and adds that the sexism and violent sexual behavior in that game "is a reality of life."³⁷⁶ But, as this article has shown, legislators in states across the country just cannot seem to take her advice and get over it.

This is the state of the controversy, despite the following facts:

- The violent crime rate in the United States is down;³⁷⁷
- Courts across the country routinely strike down anti-access laws;³⁷⁸ and

372. See, e.g., Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227 (1999) ("The Constitution protects the right to receive information and ideas. The right to receive information is the logical corollary of the right to speak.").

373. For a further discussion of the Seventh Circuit's opinion in *American Amusement*, see *supra* notes 37-45 and accompanying text.

374. For a further discussion of the Eighth Circuit's opinion in *Interactive Digital*, see *supra* notes 66-78 and accompanying text.

375. Violanti, *supra* note 336, at E1.

376. *Id.*

377. For a further discussion of the falling crime rate, see *supra* note 302 and accompanying text.

378. See, e.g., *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (finding strong likelihood Indianapolis ordinance violates free expression); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) (holding St. Louis County ordinance cannot survive strict scrutiny);

- Social science evidence of negative effects is denigrated by courts.³⁷⁹

It is time for politicians to stop pandering to the public by selling them unconstitutional laws and false fears that teens who play violent video games represent the second coming of Osama Bin Laden. In fact, at a time when fears of Bin Laden-like terrorism are quite justified — given the attacks of September 11, 2001, and the continuing acts of violence in the Middle East — it is a wonder why politicians are so obsessed with fictitious images of violence on computer games rather than with real life violence.

It is time to put video game violence into perspective. The threat of real life violence that may result from playing these games is negligible, and “research about long-term effects of violent gaming, particularly on younger players, is murky and incomplete.”³⁸⁰ The anti-access legislation advocates can trot out their now well-worn anecdotes, like the tragic shootings at Columbine High School, in which, sure enough, two troubled teens who played a violent video game called *Doom* killed people. But, for every Eric Harris and Dylan Klebold, there are literally hundreds of thousands of teens that have played *Doom* and similar fare, such as *Grand Theft Auto: Vice City*, and never committed murder, rape, or any other crime. Must their First Amendment right to receive speech be sacrificed?

This article has demonstrated that case law precedent is lodged firmly against anti-access legislation advocates, and that the wave of currently pending bills is equally likely to be found unconstitutional and enjoined. This article also has deconstructed and unpacked the rhetorical strategies of these legislative advocates. Perhaps it is now time for those individuals to follow Miranda Boncore’s advice to “get over it.”³⁸¹

Video Software Dealers Ass’n v. Maleng, (W.D. Wash 2003) (No. C03-1245L) (granting preliminary injunction against Washington law).

379. For a further discussion of the negative reception of social science evidence by courts, see *supra* notes 97-116 and accompanying text.

380. Chris Seper, *Video Games’ Allure Sparks Virtual Battle*, PLAIN DEALER (Cleveland), Mar. 24, 2003, at E1 (presenting conflicting evidence as to effects of violent video games).

381. For a further discussion see *supra* notes 375-76 and accompanying text. While advising one to “get over it” is not usually thought of as legalese, the authors note that Alex Kozinski, a maverick conservative judge on the otherwise liberal United States Court of Appeals for the Ninth Circuit, ended a recent opinion with the following: “The parties are advised to chill.” *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 908 (9th Cir. 2002).